TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 46

J. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

MOTOR BOAT SALES, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1941
CERTIORARI GRANTED MAY 12, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. —

E. V. PARKER, DEPUTY COMMISSIONER FOR THE FIFTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

VS.

MOTOR BOAT SALES, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 [Caption omitted.]

In United States District Court, Eastern District of Virginia

No. 1507—Miscellaneous

MOTOR BOAT SALES, INCORPORATED, PLAINTIFF

vs.

E. V. PARKER, DEPUTY COMMISSIONER, FIFTH COMPENSATION DISTRICT, DEFENDANT

Bill of complaint

(Filed February 9, 1940)

To the honorable ROBERT N. POLLARD, *Judge of the District Court of the United States for the Eastern District of Virginia:*

(1) The Motor Boat Sales, Incorporated, a corporation under the laws of the State of Virginia and licensed to do business therein, brings you this, its bill of complaint against E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission, he being a resident of the City of Washington, in the District of Columbia,
with his offices as said Deputy Commissioner in the City
2 of Norfolk, in the Post Office Building of said City, State of Virginia;

(2) This bill of complaint in equity is filed by the plaintiff for the purpose of reviewing and setting aside an order for compensation made by E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act as enacted by the Congress of the United States on March 4, 1927, being Section 901 et seq., Title 33, of the Code of Laws of the United States, which said Compensation order was made and entered by the said Deputy Commissioner on January 17, 1940, a copy thereof being attached hereto, made a part hereof and marked Exhibit A;

(3) Plaintiff, the Corporation named in said compensation order as employer, was during the time stated engaged exclusively in the business of buying and selling at retail maritime supplies of all kinds, including the sale of small boats ready for delivery and to go not larger than the yacht class, and outboard gasoline motors and parts from its retail store located at 3 West Grace Street, in the City of Richmond, Virginia, but it was not engaged in the business of servicing boats or doing any installation, repair, or

other work on navigable waters; that the defendant, Jessie B. Armistead, is the purported widow of George P. Armistead, Jr., deceased employee, and the mother of three minor children, Dorothy Marian Armistead, an admittedly illegitimate child, born March 24, 1933, before she was married to George P. Armistead, Jr.; George Percell Armistead III, born October 3, 1934; and William Berkley Armistead, born March 26, 1938;

(4) That George P. Armistead, Jr., claimant's decedent, was employed by the plaintiff as "a janitor and handy man" to do the work of opening plaintiff's said store in the mornings, cleaning up the store and the several apartments over it, washing windows, cleaning outboard motors, buffing tanks, driving automobile, and making deliveries on land, with instructions not to work or go upon navigable waters at any time; that on August 8, 1938, the
3 date he was drowned, he was directed by another employee to load two outboard gasoline motors from plaintiff's store into its automobile and to transport them from the store to the James River, his only duties being to assist in loading these two outboard motors from the store into the automobile, driving the automobile from there down to the James River, a distance of about two miles, and in lifting the two outboard motors out of the automobile and delivering them to the mechanic, another employee who was sent and directed to severally attach the outboard motors to a small boat owned by a Mr. Crown, a third party, for the purpose of allowing him to test the outboard motors out on his small boat on James River; that the outboard motors were thereafter separately and successively attached to the end of the Crown boat, which was up on the bank of the river at the times they were so attached, and the boat was thereafter shoved into the river; that thereupon George P. Armistead, Jr., the deceased employee, after he had performed the work he had been directed to do, in violation of his instructions not to go upon navigable waters while working for the plaintiff, of his own will and accord got into the Crown boat, without directions to do so from anyone, and of his own volition, and was riding therein for his own enjoyment and pleasure when the boat accidentally capsized without any fault or negligence of the plaintiff or the owner of the boat, and the said Armistead, Jr., was drowned at a time when he was not engaged in performing any work he had been employed or directed to do by the plaintiff, or otherwise;

(5) That thereafter, on October 14, 1938, the defendant, Jessie Booker Armistead, as widow of the said George P. Armistead, Jr., filed a claim with the Deputy Commissioner for the Fifth Compensation District, claiming compensation under the Longshore-

men's and Harbor Workers' Act for herself and on behalf of the above-named three minor children; that the said Deputy Commissioner assumed jurisdiction thereof; that the plaintiff, employer, under date of October 14, 1938, gave notice to the Deputy Commissioner that the claim would be controverted and all defenses made under the said Longshoremen's and Harbor Workers'

Compensation Act that could be lawfully made; that the
4 Act itself did not apply to or cover the plaintiff, Motor Boat Sales, Incorporated, employer, or deceased employee; that the death of the employee, George P. Armistead, Jr., did not result from injuries arising out of and in the course of his employment, and that he was not an employee in "maritime employment" or within the coverage of the Act; that the plaintiff, the employer, was not engaged in maritime business; and that the Act, if it attempted to make the plaintiff, employer, liable under these circumstances, was unconstitutional; that the Deputy Commissioner, on October 13, 1939, took testimony of certain witnesses produced before him, and, thereafter on January 17, 1940, made findings of facts and law and an award to claimant, Jessie Booker Armistead, for herself and for the three minor children, all of which more fully appears from Exhibit A attached hereto, reference to which is hereby made; that the compensation award was as follows:

"That the employer, Motor Boat Sales, Incorporated, shall pay to the claimant death benefits as follows: For herself, as widow, $4.725 per week, and in addition $1.35 per week each, on account of the children, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead. Accrued death benefits covering the period August 8, 1939, to January 14, 1940, amounting to $658.13, shall be paid forthwith. Thereafter, payments shall be made biweekly in installments of $17.55, to continue until there is a change in conditions. The employer shall also pay $190.00 to George P. Armistead, Sr., as reimbursement for funeral and burial expenses paid by him and $250.00 fee for plaintiff's counsel:"

(6) That the claim for compensation, the testimony taken before and submitted to the defendant, Deputy Commissioner, and the award, are all in his custody, and it is necessary for the Court to have possession of all of said records in order to determine whether or not the claim falls within the coverage of the Longsho men's and Harbor Workers' Act, Title 33, U. S. C. A., Sectio 01 et seq., and to determine whether or not the Deputy Commissioner had jurisdiction, and his order and award are

without evidence to support them, and are in accordance with law;

5 (7) That the claim of claimant for compensation on account of the death of George P. Armistead, Jr., does not fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act; that E. V. Parker, Deputy Commissioner, was without jurisdiction to entertain such claim, and that the order and award made by him are without evidence to support them and are not in accordance with law and are erroneous for the reasons that:

The death of George P. Armistead, Jr., claimant's decedent, was not caused by and did not result in the trade, business, occupation, or profession of the employer, the plaintiff; that the employment of George P. Armistead, Jr., claimant's decedent, was not maritime, and that he was not employed in maritime employment, in whole or in part, upon the navigable waters of the United States; that his death did not occur in the usual course of his employment or under circumstances which include compensation for his death under the Longshoremen's and Harbor Workers' Act, Title 33, U. S. C. A., Sections 901, et seq.; that he was not employed as a longshoreman or harbor worker; that he was not actually engaged in any employment in the usual course of the trade, business, occupation, or profession of the plaintiff, or performing any work he had been employed or directed to do; that he had no employment which required him at the time he was drowned to navigate, be on, or ride in the vessel, a small boat owned and belonging to a Mr. Crown, a third party, on navigable waters, or to do maritime work thereon, and that in and while he was riding in said small boat the relationship of master and servant did not exist; and that he was riding in the boat in violation of his employment and instructions of the plaintiff not to go or work upon navigable waters while engaged in and working for the plaintiff; that his death resulted from the voluntary act of claimant's decedent in riding of his own volition and accord and for his own purpose and pleasure and outside and beyond his employment in a small vessel owned by a third party; that the

Congress of the United States may not impose liability on

6 an employer to pay compensation for the death of an employee except where by virtue of the existence of employment on navigable waters and in the performance of a duty resulting from the relationship of master and servant; that the assumption of jurisdiction by the Deputy Commissioner and his findings of fact and law and construction of the Act, Title 33, U. S. C. A., 901, et seq., to the contrary render the Longshoremen's and Harbor Workers' Act unconstitutional, especially as

to Article 3 and the 5th and 14th Amendments to the Constitution of the United States; that the determination of the existence of such jurisdictional prerequisite may not under law and the Constitution of the United States be left to the decision of administrative tribunals, but is lodged in and must be determined by a Court: that the Longshoremen's and Harbor Workers' Compensation Act provides, among other things, that:

"SEC. This Act shall not apply to the injury or death of * * *. (4) An employee engaged in any employment that is casual and not in the usual course of the trade, business, occupation, or profession of the employer" * * *;

that George P. Armistead, Jr., the claimant's decedent's, in going into and upon and riding in the small boat and on navigable waters, did so casually, and was not in the usual course of his employment and of the trade or business of the plaintiff, and that the employment of claimant's decedent, George P. Armistead, Jr., was local, and that he was not in said boat or on navigable waters in pursuit of maritime employment or in the performance of any work he was or had been employed, directed, or paid to do.

(8) Plaintiff herein will be irreparably damaged if an interlocutory injunction is not granted and the payment of compensation under said award insofar as the plantiff is concerned stayed pending the final hearing of this cause; that the plaintiff herein has no adequate remedy of law and has no means of redress of the wrongs of which he complains except through injunctive proceedings to set aside the award as made and rendered against the plaintiff, and this Court should, therefore, grant, upon proper notice, an interlocutory injunction staying the payment or payments awarded by said Deputy Commissioner until the final determination of this cause.

Wherefore plaintiff prays:

(a) That this Court take jurisdiction of the subject matter of this suit;

(b) That a mandatory injunction be granted by and issue from this Court to the defendant, E. V. Parker, Deputy Commissioner of the Fifth Compensation District of the United States, commanding him within a certain number of days from receipt thereof, to deliver to this Court or its Clerk, a transcript of the record in re Jessie Booker Armistead, widow of George P. Armistead, Jr., claimant, against Motor Boat Sales, Incorporated, employer, being case No. 825-1; that upon application of the plaintiff an interlocutory injunction be issued staying all payments ordered by the said Deputy Commissioner in said compensation order and award

of compensation hereinabove described, pending final determination of this cause;

(c) That upon final hearing a permanent injunction be granted and issued, permanently enjoining and staying all payments ordered by said Deputy Commissioner to be paid in said compensation order and award of compensation;

(d) That upon final hearing it be decreed by this Court that the said compensation order and award of compensation, made by said Deputy Commissioner, was without evidence to support it or contrary to the character of the evidence, and was not in accordance with law, and was in violation of the Constitution of the United States, and that the said Deputy Commissioner was without jurisdiction to entertain said claim or make said award, and that same be vacated, set aside, and held to be of no force, virtue, or effect;

(e) That this Court issue its writ of subpoena directed to said defendant, demanding him upon a certain day and under a certain penalty to be therein specified, to appear before this Court and to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the matters and things herein set forth and complained of and to stand, abide by
8 and perform all orders and decrees of this Court which may be entered herein; and that the plaintiff herein may have such other and further relief as he may be entitled to in equity and good conscience.

And your complainant will ever pray.

This suit is brought pursuant to an order of the Board of Directors of said Motor Boat Sales, Incorporated, dated Feb. 6, 1940.

(Sgd.) MOTOR BOAT SALES, INCORPORATED.
By (Sgd.) S. KING FULTON, *Its President.*

(Sgd.) M. J. FULTON,
Counsel of Record for Plaintiff,
Motor Boat Sales, Incorporated,
520 Mutual Building, Richmond, Virginia.

[*Duly sworn to by S. King Fulton; jurat omitted in printing.*]

I, the undersigned M. J. Fulton, counsel of record in the above entitled cause, hereby certify that the above affidavit and application made by Motor Boat Sales, Incorporated, are made in good faith by him.

(Sgd.) M. J. FULTON,
Counsel of Record for Plaintiff,
Motor Boat Sales, Incorporated.

9 *Exhibit A to bill of complaint*

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

FIFTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

JESSIE BOOKER ARMISTEAD, WIDOW OF GEORGE P. ARMISTEAD, JR. (DECEASED), CLAIMANT

vs.

MOTOR BOAT SALES, INC., EMPLOYER

Compensation Order—Award of Compensation—Case No. 825–1

No insurance

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 8th day of August 1938 George P. Armistead, Jr., was in the employ of the employer above named at Richmond, in the State of Virginia, in the Fifth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was uninsured; that on said day George P. Armistead, Jr., while performing service for the employer upon the navigable waters of the United States, sustained personal injury, resulting in his death, while he was employed as a janitor and handyman; that on said day Armistead had been ordered by his superiors to assist a mechanic, a fellow employee, in carrying two outboard motors, the property of the company, to the river and attach them to the stern of a motorboat for the purpose of testing the same and interesting the owners of the motorboat in the sale of one of the said motors; that upon reaching the river Armistead assisted the mechanic in attaching one of the motors to the boat and the vessel made a trip about the harbor,

10 the two owners of the vessel, the mechanic, and Armistead making the trip, the boat being driven by the mechanic, Cooper; that Armistead then assisted in taking off the first

motor and installing the second one, after which he entered the bow of the boat and, with Cooper driving, another trip about the harbor was made; that the two owners did not make this trip, having to leave because of other engagements; that while the vessel was being driven on the second trip it struck an obstruction, was overturned, and Armistead was drowned;

Armistead was to assist the mechanic, Cooper, who was his superior. The latter gave no instructions as to Armistead accompanying or not accompanying him on the testing trips; however, the services of Armistead were helpful to the mechanic, in that he acted as a look-out man in the bow. Cooper tacitly approved and acquiesced in the aid given him by the inferior employee, and such aid was in furtherance of the employer's interests. Armistead's work while in the boat was not for the purpose of pleasure, and he acted as would be expected of a colored helper under the circumstances;

The employer's business was the selling of motor cruisers, sailboats, motors for outboard boats, and the sale of boat and maritime supplies. On occasions its employees (mechanics) went aboard vessels, serviced them, and tested out ignition on trips on navigable waters;

That the death of George P. Armistead, Jr., by drowning, on August 8, 1938, arose out of and in the course of the employment; that his death occurred upon navigable waters; and that at the time of death he was engaged in maritime employment;

That the average annual earnings of George P. Armistead, Jr., at the time of his death amounted to the sum of $702.00;

That Jessie Booker Armistead is the surviving wife of George P. Armistead, Jr., and was living with him at the time of his death; that as widow she is entitled to death benefits at the rate of $4.725 per week; that Dorothy Marian Armistead, born March 24, 1933, George Percel Armistead, III, born October 3, 1934, and William Berkley Armistead, born March 26, 1938, are the
11 surviving children of George P. Armistead, Jr., Dorothy Marian Armistead being an acknowledged illegitimate child, and each is entitled to death benefits at the rate of $1.35 per week; that the accrued death benefits for the period August 8, 1938, to January 14, 1940, 75 weeks, at $8.775 per week, amount to $658.13;

That funeral and burial expenses were incurred in the amount of $190.00, and that said funeral bill was paid in full by George P. Armistead, Sr.;

Upon the foregoing facts the Deputy Commissioner makes the following award:

That the employer, Motor Boat Sales, Inc., shall pay to the claimant death benefits as follows: For herself, as widow, $4.725 per week, and in addition $1.35 per week each, on account of the children, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead. Accrued death benefits covering the period August 8, 1938, to January 14, 1940, amounting to $658.13, shall be paid forthwith. Thereafter, payments shall be made biweekly in installments of $17.55, to continue until there is a change in conditions. The employer shall also pay $190.00 to George P. Armistead, Sr., as reimbursement for funeral and burial expenses paid by him.

An attorney's fee for services rendered is approved in favor of Messrs. Parrish, Butcher & Parrish in the sum of $250.00, which fee shall be a lien upon this award and discharged by deduction from the accrued compensation.

Given under my hand at Norfolk, Virginia, this 17th day of January 1940.

(Signed) E. V. PARKER,
Deputy Commissioner,
Fifth Compensation District.

12 PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant and to the uninsured employer, at the last known address of each, as follows: Jessie Booker Armistead, 22 East Hill Street, Richmond, Va.; Motor Boat Sales, Inc., 3 West Grace Street, Richmond, Va.

(Signed) MARGARET W. LATHAN,
Clerk.

Mailed January 17, 1940.

Copy to—Messrs. Parrish, Butcher & Parrish, Attorneys at Law, Mutual Bldg., Richmond, Va.; Minitree Jones Fulton, Esq., Suite 520 Mutual Bldg., Richmond, Va.; George Percell Armistead, Sr., 22 East Hill St., Richmond, Va.; Dr. W. F. Bursey, Secretary, Industrial Commission of Virginia, Department of Workmen's Compensation, Richmond, Va.

13 In United States District Court

Motion to dismiss

Filed March 28, 1940

Now comes E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District, Norfolk, Virginia, defendant herein, by Sterling Hutcheson,

United States Attorney, his attorney, and moves that the bill of complaint in this proceeding be dismissed for the following reasons:

1. That the said bill and each article thereof is insufficient in law.

2. That neither the said bill nor any article therein alleges sufficient grounds upon which this Court should refuse, reverse, suspend, enjoin, or set aside the award heretofore made by the Deputy Commissioner.

3. The findings of fact of the Commissioner are conclusive and fully justify his award based thereon.

4. The findings of the Deputy Commissioner, fully supported by the evidence before him, are conclusive and should not be refused, reversed, suspended, enjoined, or set aside.

5. The findings of fact by the Deputy Commissioner, which are fully supported by the evidence before him, show that the said Deputy Commissioner had jurisdiction under the Act of Congress to hear and determine the said findings of fact, and the evidence upon which they are based show that the claim did not come within the exception of Section 3 of the Longshoremen's Act.

6. No ground for the award of an injunction and restraining order is shown in said bill.

E. V. PARKER,
Deputy Commissioner.

By (Sgd.) STERLING HUTCHESON,
Sterling Hutcheson,
United States Attorney.

By (Sgd.) H. H. HOLT, Jr.,
Asst. U. S. Attorney.

14 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Order filing answer

Entered and filed March 29, 1940

This day came E. V. Parker, Deputy Commissioner, United States Employees' Compensation, Commission, Fifth Compensation District, Norfolk, Virginia, defendant herein, by Sterling Hutcheson, United States Attorney for the Eastern District of Virginia, his attorney, and asks leave of the Court to file his answer herein without waiving any rights in his motion to dismiss heretofore filed, which leave is granted, and thereupon, said answer is duly filed.

(Sgd.) ROBT. N. POLLARD.
United States District Judge.

RICHMOND, VIRGINIA, *March 29, 1940.*

In United States District Court

Answer

Filed March 29, 1940

To the Honorable ROBERT N. POLLARD, *Judge of the Court Aforesaid:*

The respondent, E. V. Parker, Deputy Commissioner, United States Employees' Compensation, Commission, Fifth Compensation District, for his answer to the bill of complaint filed in this cause by the Motor Boat Sales Incorporated, answering, saith:

1. Respondent admits the allegations of Paragraph 1 of said bill.

2. Respondent admits that the bill of complaint is filed in this proceeding for the purposes set forth in Paragraph 2 of said bill.

3. Respondent denies that allegations of Paragraphs 3, 4, and 5 of the bill of complaint and adopts as his affirmative allegations the findings of fact of the Deputy Commissioner as set forth in the Commissioner's findings of fact and award dated January 17, 1940, referred to as Exhibit A in said bill of complaint.

4. Respondent admits the allegations of Paragraph 6 of the bill of complaint and files herewith copy of the transcript of the record of the hearing before him, together with a copy of the award of the Commissioner made in these proceedings as Exhibits A and B and asks that they be read as a part of his answer as if fully set forth herein.

5. Respondent denies the allegations of Paragraph 7 of the bill of complaint.

6. Respondent denies that the plaintiff will be irreparably damaged as contained in Paragraph 8 of said bill and denies that the plaintiff is entitled to an injunction in these proceedings.

7. As further answer to the said bill of complaint, the respondent avers that the findings of fact by the hearing Commissioner are supported by the evidence and are final and conclusive and are not subject to review by this Honorable Court; that the Longshoremen's Act is constitutional and should be liberally construed to effectuate beneficent purposes for which it was enacted; that the deceased, George P. Armistead, Jr., and Motor Boat Sales, Incorporated, were employee and employer, respectively, and subject to the provisions of the Longshoremen's and Harbor Workers' Act; and that the said deceased met his death by accident arising out of and in course of his employment upon the navigable waters of the United States while engaged in Maritime employment under

such circumstances as to entitle his dependents, as defined by the said Act, to compensation.

8. Respondent denies that the Longshoremen's and Harbor Workers' Act contains the provision referred to in Paragraph 7, Page 7, of the bill of complaint.

16 Wherefore the defendant prays that the bill of complaint be dismissed at the cost of the plaintiff.

Respectfully submitted.

E. V. PARKER,
Deputy Commissioner.
By (Sgd.) STERLING HUTCHESON,
Sterling Hutcheson,
United States Attorney.

17 *Defendant's exhibit A*

Filed March 29, 1940

United States Employees' Compensation Commission

E. V. PARKER, DEPUTY COMMISSIONER

Fifth Compensation District, Norfolk, Virginia

JESSIE ARMISTEAD, WIDOW OF GEORGE P. ARMISTEAD, JR., CLAIMANT

v.

MOTOR BOAT SALES, INCORPORATED, EMPLOYER

Case No. 825-1

Pursuant to notice, this matter was heard before E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, at Richmond, Virginia, on the 13th day of October 1939.

Appearances

Jessie Armistead, Claimant, in person. Mr. R. R. Parrish, representing the claimant. Mr. M. J. Fulton, representing the Employer.

18 The DEPUTY COMMISSIONER. This hearing, after due notice to all parties, is on the case of Jessie Armistead, widow of George P. Armistead, Jr., a former employee of the Motor Boat Sales, Incorporated, Employer, who was not insured under the Federal Act. The following report forms were submitted, in accordance with the Federal Statutes, viz:

Employer's First Report to Deputy Commissioner of Accident or Occupational Disease, Form U. S.-202, dated October 14, 1938.

Proof of Death, Form U. S.-264, dated October 20, 1938.

Notice to the Deputy Commissioner That Claim Will Be Controverted, Form U. S.-207, dated October 14, 1938.

Proof of Burial and Funeral—By The Undertaker, Form U. S.-265, dated August 30, 1938.

The Widow's Claim for Compensation, Form U. S.-262, dated August 30, 1938, and

Notices of Hearing, Form U. S.-226-B, dated September 28, 1938, and September 27, 1939.

The DEPUTY COMMISSIONER. What is the employer's defense, Mr. Fulton, if you will state it for the record?

Statement of defense

Mr. FULTON. All the defenses that can be made under the Act and under the usual issues, where the facts are controverted, and that the Act under which the claim is made, does not apply to the Defendant, Motor Boat Sales, Incorporated; that the employee, whose death is made the basis of the claim here, that his death did not result from injury arising out of and in the course of his employment; that he was not an employee within the terms of Section 3 of the Employment Act, and that we were not an employer engaged in maritime business, and that he was not an employee within maritime employment, and that the Act, if it seeks to make the employer liable, is unconstitutional.

19 The DEPUTY COMMISSIONER. The Supreme Court has held otherwise.

The DEPUTY COMMISSIONER. With respect to the average weekly wage; it is given on the Employer's Report as $13.50.

Mr. PARRISH. If your Honor please, I had expected to agree to that, but I understand the deceased put in considerable overtime.

The DEPUTY COMMISSIONER. We can make that a matter of proof. Do you want to offer evidence on that point?

Mr. PARRISH. I will call Mr. Todd on that point.

The DEPUTY COMMISSIONER. We will make it an issue.

Mr. PARRISH. Mr. Todd, will you have your books here for a year prior to his death?

Mr. S. KING FULTON. The Social Security record will be sufficient, and we will have it sent down.

Stipulation re proof of death

Mr. PARRISH. It has been stipulated that Doctor Williams' Proof of Death, on Form U. S. 264, which was put in the record by The

Deputy Commissioner, correctly shows the cause of death. Doctor Williams is present, but we thought we could prove it by stipulating the Form.

The DEPUTY COMMISSIONER. Is that agreeable?

Mr. FULTON. Yes, sir.

* * * * *

JESSIE ARMISTEAD, Claimant, witness in her own behalf, having been duly sworn, on oath testified as follows:

By the DEPUTY COMMISSIONER:

Q. Give your name and address, please.

A. No answer.

By Mr. PARRISH:

Q. You are Jessie Armistead?

A. Yes, sir.

Q. Where do you live?

A. 22 East Hill Street.

Q. You are the widow of George P. Armistead, Jr., the deceased in this case?

A. Yes, sir.

Q. How old are you, Jessie?

A. 22.

Q. When were you married to George?

A. May 26, 1934.

Mr. PARRISH. We offer in evidence certified copy of marriage license of George P. Armistead, Jr., and Jessie D. Booker, which is filed herewith as Claimant's Exhibit No. 1.

By Mr. PARRISH:

Q. How many children were born of this marriage?

A. 3.

Q. Give their names and ages.

A. Dorothy Marion: 6.

Q. When was she born?

A. March 24th.

Q. What year?

A. 1933.

Q. What are the names of the other children?

A. George Purcell Armistead III.

Q. When was he born?

A. October 3, 1934.

Q. What is the name of the youngest one?

A. William Berkley Armistead.

21 *Claimant's Exhibit No. 1*

No. 11–P. 66

MARRIAGE LICENSE

(Seal of Court here superimposed on an adhesive wafer.)

Virginia, City of Richmond, to wit:

To Any Person Licensed to Celebrate Marriages:

You are hereby authorized to join together in the Holy State of Matrimony, according to the rites and ceremonies of your Church or religious denomination and the laws of the Commonwealth of Virginia, George P. Armistead, Jr., and Jesse D. Booker.

Given under my hand, as Clerk of Hustings, Court of -------- County (or City), this 26 day of May 1934.

WALTER CHRISTIAN, *Clerk.*

MARRIAGE CERTIFICATE

TO BE ANNEXED TO LICENSE REQUIRED BY SECTION 5074 OF THE CODE OF VIRGINIA

Virginia: In the Clerk's Office of the Hustings Court for the City of Richmond. Date of Marriage, May 26, 1934. Place of Marriage, Richmond, Va.

(Full name of parties)

George P. Armistead and Jessie D. Baker. Age of Husband, 21 years; Condition (single, widowed, or divorced), Single. Age of Wife, 19 years; Condition, (single, widowed, or divorced), Single. Race (white, colored, or otherwise) of Husband, Colored; of Wife, Colored. Husband's Place of Birth, Richmond, Va.

(Present)

Mailing Address, 22 E. Hill St. Wife's Place of Birth, Amelia Co., Va. Mailing Address, Richmond, Va. Names of Parents Husband, George P. Armistead and Minnie Berkley.

(Full maiden name)

Wife, Junius Booker and Florence Green.

(Full maiden name)

Occupation of Husband, Teacher.

Given under my hand this 26 day of May 1934.

WALTER CHRISTIAN, *Clerk.*

CERTIFICATE OF TIME AND PLACE OF MARRIAGE

I, J. H. Binford Peay, appointed by Hustings Court of the ——— Church or religious order of that name, do certify that on the 26 day of May 1934, at Richmond, Virginia, under authority of the above License, I joined together in the Holy State of Matrimony the persons named and described therein. I qualified and gave bond according to law authorizing me to celebrate the rites of marriage in the County (or City) of Richmond, State of Virginia.

Given under my hand this 26 day of May 1934.

J. H. BINFORD PEAY.

(Person who performs ceremony sign here)

The Minister or other person celebrating a marriage is required, within thirty (30) days thereafter, to return the License and Certificate of the Clerk and his certificate of the time and place at which the marriage was celebrated to the Clerk who issued the License; failure to comply with these requirements of the law makes the Minister or other person celebrating the marriage liable to a fine of not less than ten nor more than twenty dollars for each offense (See Section 5074 of the Code of Virginia, 1919).

A Copy Teste:

THOS. R. MILLER, *Dep. Clk.*

22 Q. When was he born?

A. March 26th.

Q. What year?

A. 1938.

Q. What did you understand from George were his duties while working for the Motor Boat Sales, Jesse?

By Mr. FULTON:

Q. Just a moment. Over the testimony relating to the first child; what is the name of the first child?

A. Dorothy Marion.

Mr. FULTON. I move that that child be stricken out. That child was born before the marriage.

Mr. PARRISH. Do you want the proof of acknowledgment?

The DEPUTY COMMISSIONER. You understand the Act covers acknowledged children.

By Mr. PARRISH:

Q. Your first child, Dorothy, was born before you were married?

A. Yes, sir.

Q. Did he acknowledge that child after the marriage?

Mr. FULTON. I object.

The DEPUTY COMMISSIONER. She can answer the question.

Mr. FULTON. Exception.

A. Yes, sir.

Q. Did he consider the child as his own, just as the other two?

A. Yes, sir.

Q. Did he provide for her as the others?

A. Yes, sir.

23 Mr. FULTON. I will note an objection and exception to all that testimony.

Q. I asked you what you understood from George his duties were?

A. He had to fix and repair the motors, and, after fixing them, carry them out and test them.

Q. Do you know whether or not, during the two years he worked there, he went on the James River and Rappahannock River and did work for the Motor Boat Sales?

A. Yes, sir.

By Mr. FULTON:

Q. Do you know that of your own knowledge or is that hearsay?

A. I know's it.

By Mr. PARRISH:

Q. State whether you knew that of your own knowledge.

A. He told me.

Q. What did he tell you?

Mr. FULTON. I object to this testimony as being purely hearsay and all like testimony.

The DEPUTY COMMISSIONER. That is admissible if it is corroborated. She can answer the question.

Mr. FULTON. Exception.

A. He had to stay down on the boat, and after they sold it he had to stay down and watch it overnight.

Q. Did you see him at the boat?

A. Yes, sir.

Q. Did he come home with you on that occasion?

A. No, sir.

Q. Do you know what he did?

A. He stayed down there overnight.

24 Q. Do you know whether he was sent out of town by his employer overnight?

A. Yes, sir; by Mr. Todd.

Q. Who did George consider his boss?

A. Mr. Todd.

Mr. FULTON. The same objection to the questions as to whom he considered his boss.

Q. The record will show he is Vice President. Do you recall the night he spent on the boat?

A. It was Sunday night, but I don't remember the date.

By the DEPUTY COMMISSIONER:

Q. How long before his death?

A. I don't know.

By Mr. PARRISH:

Q. Do you remember this occasion he was sent out of town and spent the night; was it within a year of his death?

A. It was over a year.

By Mr. FULTON:

Q. Jessie, you said your first child was born March 24, 1933. How long after that was it that you and George married?

A. She was a little over a year old when we got married.

Q. Now, you say that George worked at the Motor Boat Sales, Incorporated, and that he told you that he had been sent out of town over a year before his death and spent the night; is that correct; is that what he told you?

A. He told me he spent the night out of town and he had to go for Mr. Todd.

Q. Mr. Todd was in the employ of the Motor Boat Sales and stayed at the office and store?

A. Yes, sir.

Q. You knew where the store of the Motor Boat Sales was on Grace Street; No. 3 West Grace Street?

A. Yes, sir.

Q. And isn't it a fact that George worked there as janitor and delivery boy; wasn't that his work up there?

A. No; it wasn't.

Q. Is all you know what he told you?

A. I used to go and see him there.

Q. He was cleaning up and cleaning motors and cleaning dirt, had charge of cleaning up the store and would drive the truck and automobiles and trailers from the store to where they were going?

A. He used to fix motors too.

Q. You don't say he was a mechanic up there?

A. He used to do the work of a mechanic.

Q. He used to do the work of a mechanic?

A. Yes, sir.

Q. Who was the mechanic up there?

A. Mr. Lloyd.

Q. Mr. Lloyd?

A. Yes, sir.

Q. Isn't all you saw George do about the motors was clean them up and polish them up after they had been worked on, if in there for repair, and place them in the store where they wanted them?

A. He used to fix them and put them together.

Q. All you know is that you saw him do that up there?

A. Yes, sir.

26 Q. What time would you be up there and see George?

A. I used to go downtown and would stop there. I would go in the side way and saw him working on the motors.

Q. You don't know what time it was?

A. No, sir.

Q. What do you mean "side way"?

A. Alley way.

Q. You went in the rear of the store?

A. Yes, sir.

Q. You said he told you and you went down there and saw him staying in the boat one night and watching the boat one night?

A. Yes, sir.

Q. And when was that?

A. The year before he got drowned.

Q. That boat was anchored and he was simply watching it?

A. Yes, sir.

Q. It was tied to the bank?

A. Yes, sir.

Q. And he was simply watching, see[illegible] at nobody carried it away; is that right?

A. Yes, sir.

Q. Do you know whether he was paid by the owner of that boat to watch it, or who paid him?

A. I don't know.

Q. You don't know who paid him?

A. No, sir.

By Mr. Parrish:

Q. There is one thing I forgot to ask you: Did George ever work beyond his usual hours; put in overtime?

27 A. Yes, sir.

Q. I will ask you whether he brought home one of the small outboard motors to work on at home?

A. Yes, sir.

Q. It was while he was working for the Motor Boat Sales?

A. Yes, sir.

Q. It wasn't his boat?

A. No, sir.

The DEPUTY COMMISSIONER. Have you got the birth certificates of the children? Do you want to offer them?

Mr. PARRISH. I do not have them.

The DEPUTY COMMISSIONER. I was wondering about the dates.

Mr. PARRISH. I checked them with the father.

The DEPUTY COMMISSIONER. They sent them in, but they wanted them back, Mr. Bursey said.

Mr. PARRISH. I have them. I will offer them. That is a copy of them, or, if the Commissioner wishes, I will secure birth certificates and forward them to the Commissioner.

Mr. FULTON. Mr. Parrish, do you know that that is a copy?

Mr. PARRISH. No; I can't say I know this is a copy.

Mr. FULTON. It corresponds with what you said.

Mr. PARRISH. I can't agree that it is a copy.

Mr. FULTON. We will accept it as a copy.

Mr. PARRISH. I will secure certified copies of the birth certificates and file them as Claimant's Exhibit No. 2.

And further this witness sayeth not.

GEORGE W. TODD, a witness for the Claimant, having been duly sworn, testified as follows:

28 By the DEPUTY COMMISSIONER:

Q. Give us your name and address.

A. George W. Todd; 4505 Brook Road.

By Mr. PARRISH:

Q. On August 8, 1938, what was your occupation?

A. I was Assistant Manager and outside salesman for the Motor Boat Sales, Incorporated.

Q. Were you an officer of the Corporation?

A. Yes, sir.

Q. What was your official position with the Motor Boat Sales?

A. Vice President.

Q. You were at the company's place of business, 3 West Grace Street, practically every day?

A. Most every day.

Q. What was the purpose of incorporating the Motor Boat Sales?

Mr. FULTON. I object to that. That is not relevant.

Mr. PARRISH. It seems to me that it is relev t to show what the nature of the business is, when his defense is that it does not come under the Maritime Act and it does not apply, we want to show what it was chartered for.

The DEPUTY COMMISSIONER. He can answer that.

Mr. FULTON. Exception.

A. I can't answer that question, because I was elected an officer after it was formed.

Q. What business did the company transact on August 8, 1938?

A. We were in the retail store business, dealing in mari-
29 time supplies of all kinds. That includes the sale of boats—nothing in the yacht class—but some outboard motors.

Q. And accessories: it would include the sale of both?

A. Yes, sir; gasoline motors and parts.

Q. Who engaged the services of George P. Armistead, Jr., the deceased?

A. I don't know. I think he was hired by Mr. Fulton.

Q. Mr. King Fulton, who is present today?

A. Yes, sir.

Q. Mr. Fulton spent most of his ti e about the date of his death in Washington?

A. Mr. Fulton at that time was in Was..ngton.

Q. In his absence you were the officer in charge of the Richmond Store?

A. Mr. Hobbs and I jointly. He was in the office and I was on the outside.

Q. After you were notified of this boy's death, you immediately went down to the river?

A. I was called to see what I could do to notify and help find the body.

Q. You went down immediately?

A. Yes, sir.

Q. From the investigation, it appeared that the boy had been drowned in the channel?

A. Yes, sir.

Q. Which is navigable waters?

A. I think so, from what I understand where it happened.

Q. The ocean going vessels come up further than that?

30 A. I don't know where it occurred. I think it is a navigable stream where they said the boy was drowned.

Q. Assuming it occurred opposite the James River Oil Company's dock, that would be navigable water?

A. Yes, sir.

Q. How many employees did your concern have on August 8, 1938?

A. George Armistead, John Cooper, Welford Lloyd, Randolph Hobbs, Miss Johnson, and myself.

Q. You did not come under the Workmen's Compensation Act of Virginia at that time?

A. No, sir.

Q. And you were not insured under that Act?

A. No, sir.

Q. You have sent for the record as to his wages?

A. I have got it.

Q. You have it?

A. Yes, sir.

Mr. PARRISH. We will introduce that now. I don't know what it shows. We will introduce the chart and the wage can be computed from the records.

The DEPUTY COMMISSIONER. Can you read off the figures for the year prior to his death? I don't know whether you have it for the year. Can you take it approximately for the nearest fifty-two weeks prior to the accident?

Mr. S. KING FULTON. I will mark it.

Mr. PARRISH. So far as I am concerned, your Honor, the overtime shown by the record is so small, I don't think it would have any bearing on the base rate of $13.50 and we will agree on that.

31 The DEPUTY COMMISSIONER. You will stipulate that $13.50 is the average weekly wage?

Mr. PARRISH. Yes, sir.

Mr. FULTON. That is entirely agreeable.

By Mr. PARRISH:

Q. Mr. Todd, this boy was paid in full for the week during which he was drowned?

A. I don't know. That is not for me to answer. I wouldn't be able to answer that.

Mr. FULTON. We can stipulate what he was paid.

Mr. S. KING FULTON. He was paid for the full week. The last payment of $13.50 was for the week of August 8th. I don't know what day that was.

By Mr. PARRISH:

Q. Johnnie Cooper, was he employed on August 8, 1938?

A. Yes, sir.

Q. And he was on the boat which capsized, also; the same boat George Armistead was on?

A. As far as I know.

Q. You found him down there?

A. Yes, sir.

Mr. FULTON. He didn't handle the transaction, but we have the gentleman here that did.

Q. Whose boat was it in which they were riding at the time?

A. The boat belonged to Mr. W. M. Crown and his brother and I think it was owned jointly by the two. It had just been constructed.

Q. You all sold it to them?

A. No, sir; they built it.

32 Q. Whose motor was on it?

A. The property of the Motor Boat Sales, Incorporated.

Q. Outboard motor?

A. Yes, sir.

Q. You had sent the motor down?

A. I don't know.

Q. The company did?

A. I was their salesman. I don't know about it.

Mr. PARRISH. That is all at this time. I will reserve the right to recall him.

By the DEPUTY COMMISSIONER:

Q. Are you still with the company?

A. Yes, sir.

Q. You said the company engaged in dealing in maritime supplies of all kinds?

A. Yes, sir; to cover the boats we handle.

Q. That means that you serviced boats?

A. What do you mean "serviced boats?"

Q. Any kind of equipment they wanted to put on the boat, would you supply it?

A. No, sir; we didn't make a specialty of it. I don't know of any instance where we did installation work.

Q. You sell the boats?

A. The boats we sell are ready to go.

Q. Did you do any repair work after that?

A. No, sir; that was for the boat yards.

Q. How often would your employees go aboard any boat; every day?

A. No, sir; not every day. It was just a rarity that we
33 got on boats. We haven't got any business getting on other people's boats.

Q. Suppose a fellow wanted a compass or chart or some other equipment that you sell, would you deliver it?

A. No, sir; we don't have a delivery truck. The only thing was my car.

Q. What would be the largest boat you handle?

A. 38-foot boat.

Q. Cruiser?

A. Yes, sir.

Q. Cabin on it?

A. Yes, sir.

By Mr. PARRISH:

Q. Your company is agent for the cruiser Chris-Craft?

A. That is the largest one we sell.

Q. You sell all the Chris-Craft people's boats?

A. We sell all we can.

Q. If I came to you to get one, I would get it from you as agent; you never turned it down?

A. No, sir; not on the stuff we handle.

Q. Your concern has done work servicing small boats?

A. In our place.

Q. You have serviced boats on the water?

A. We bring in the boat and fix it.

Q. Didn't you have a representative from your firm at the National Outboard Races?

A. No, sir; not a representative.

Q. Didn't you have a mechanic and service man there?

34 A. No, sir; we didn't have anything to do with it.

Q. Didn't have any representative there?

A. All we did was loan an outboard and motor.

Q. You did have a boat there?

A. Loaned to Mr. Mullen.

By Mr. FULTON:

Q. That was outside of your business?

A. Yes, sir. We have been helpful to him.

By Mr. PARRISH:

Q. Hasn't your firm demonstrated boats for sale on the James River?

A. No, sir; I can't say we have.

Q. To refresh your memory: Didn't you take me riding one day, trying to interest me in a cruiser?

A. Yes, sir; we did. I don't know what boat it was. It seemed to me it belonged to a customer and we borrowed the boat to carry you riding.

By the DEPUTY COMMISSIONER:

Q. Mr. Todd, you said you serviced your own boats?

A. If we trade a boat, which we do, and it is brought in by the customer on a trailer, and if anything is needed to be done to it, like painting, we do it.

Q. Did you do any work on the water?

A. No, sir; we are not equipped for it.

Q. Did you repair engines of boats?

A. No, sir; we don't have any equipment for that.

Q. Any boat while in the water, if the ignition went bad, would you send a man?

35 A. Yes, sir; we have done it. The man would not go out in the water.

Q. The boat would be at the dock in the James River?

A. Yes, sir.

Q. What are these boats used for; for pleasure?

A. The majority are for pleasure.

Q. What do you use them for, if not for pleasure?

A. Unless one of the Indians on the Mattaponi River would buy a boat for his purposes, to take hunting parties.

Q. Did you sell them for moving supplies of freight and cargo?

A. No, sir; we don't have that kind of boat.

Q. They might have used them for fishing parties?

A. It is too nice a boat to be used for fishing parties.

And further this witness sayeth not.

GEORGE PURCELL ARMISTEAD, Sr., a witness for the Claimant, having been duly sworn, testified as follows:

By Mr. PARRISH:

Q. State your full name and address.

A. George Purcell Armistead, Sr.; 22 East Hill Street.

Q. You are the father of the deceased in this case?

A. Yes, sir.

Q. Do you know how long your boy had been working for the Motor Boat Sales, Incorporated?

A. About two years.

Q. Do you know what his work was?

A. Janitor and Mechanic's Helper.

Q. Did you ever see him on a boat of the Motor Boat Sales; if so, where?

36 A. I saw him on the boat. I taken him, his wife, and children on two occasions. He was supposed to go and stay all night, and I left him there.

Q. You left him down there?

A. Yes, sir. I took his wife and children and carried them home.

Q. So far as you know, he stayed there?

A. Yes, sir.

Q. It was your understanding that he stayed there for his boss, Mr. Todd?

A. Yes, sir; everything was what Mr. Todd said do.

Q. Do you recall whether he was sent out of town with respect to his work?

A. He told me he had to go to the Rappahannock or somewhere to help the mechanic with a boat.

Q. Do you recall when that was?

A. No, sir; I couldn't tell when that was.

Q. It was after he went to work for the Motor Boat Sales, Incorporated?

A. Yes, sir.

By Mr. FULTON:

Q. All you know is what he told you?

A. I carried him to the boat; him, his wife, and children.

Q. You don't knew when that was?

A. No, sir; not exactly. He was working for the company, though.

And further this witness sayeth not.

PHIL GOODE, a witness for the Claimant, having been duly sworn, testified as follows:

By Mr. PARRISH:

37 Q. What is your full name?

A. Phil Goode.

Q. What is your age?

A. Forty-three years old.

Q. Where do you live, Phil?

A. Fulton: 14 Orleans Street.

Q. That is about a half-block from the James River?

A. Not quite a half-block; less than half a block.

Q. Did you see the upset of the boat on which George Armistead was riding on August 8, 1938?

A. Yes, sir.

Q. Where were you at the time?

A. I was standing on the hill up by Mr. Sternheimer's; me and another fellow went over there.

Q. Mr. Sternheimer's place is some little distance below the James River Oil Company?

A. Yes, sir.

Q. Joins it?

A. Yes, sir; and the river comes up there like that [indicating].

Q. That is down stream?

A. Yes, sir.

Q. Did you see the boat upset?

A. Yes, sir.

Q. How many people were on it?

A. Two.

Q. Tell what you saw?

A. The reason I went out there was because the boat went down the river making a noise like an airplane. When she come
38 back, we were standing out there, and the current was swift. It was high. When she makes the loop to turn, the boat capsized and the colored man went down and come up and grabbed for the boat and went down, and the white fellow grabs hold of the boat and held it, and, the motor being heavy, it pulled the bow of the boat three and one-half feet in the air, and he was floating down the river hollering help, help, help, and when he got down to where Mr. Mulligan's barge was, and I said, "Lord, see if we can save him," and I went down and was going to get in the boat, but it was locked, and I asked another fellow to help me break the chain, and Mr. Parker's boat was parked there, but it was a log chain on it and we couldn't break it, and this fellow floated opposite Mr. Mulligan's boat, and Mr. Mulligan rescued him and taken him and put him on his boat and taken his little boat and pulled it on the bank. He had two motors demonstrating—one was a sea lion or sea horse—and I never had met the boy and never had seen him to say anything to him.

Q. You mean the boy that was drowned?

A. Yes, sir. I never seen him to speak to him, but I have seen him with other motors, because I thought it belonged to him. I used to go down there because I would hear the noise of the motor, which sounded like an airplane.

Q. You were not any kin to him, George?

A. No, sir. I don't know where he lived. They told me that is his father. I have never seen him to know him.

Q. Where was the motor to be demonstrated?

A. Here is the James River Oil Company, and one was setting here and one was on the boat and the one was on the shore where they had demonstrated.

39 Q. Where that boat upset or capsized, was it in the channel?

A. Yes, sir.

Q. Where boats come in the City Dock?

A. Yes, sir.

Mr. FULTON. No questions.

And further this witness sayeth not.

WELFORD EARL LLOYD, a witness for the Claimant, having been duly sworn, testified, as follows:

By Mr. PARRISH:

Q. Please state your full name?

A. Welford Earl Lloyd.

Q. How old are you, Mr. Lloyd?
A. 36.
Q. By whom are you employed?
A. At present?
Q. Yes, sir.
A. Tignor's.
Q. What is your occupation?
A. I am a mechanic and salesman together.
Q. Have you, in the past, been employed by the Motor Boat Sales?
A. Yes, sir.
Q. When?
A. For about two years off and on; little more than two years, off and on.
Q. During what years; just approximately?
A. I think Mr. Fulton hired me in 1937 and I worked until the latter part of 1938, with the exception of three months.
Q. You were working there when George Armistead was drowned?
A. Yes, sir.
Q. What was the nature of your duties?
A. I had charge of the shop.
Q. You would work on motors?
A. Yes, sir.
Q. You knew George, of course?
A. Yes, sir.
Q. What did he do around there?
A. The first thing he did was clean up the place. Sometime it would take a half day to a day, and he was in the shop cleaning up motors, buffing tanks, and making deliveries.
Q. General handy man?
A. Yes, sir.
Q. And, as far as possible, he assisted in cleaning up and working on the motors?
A. I had another helper.
Q. He did assist you?
A. Yes, sir.
Q. You were in the shop the day he went down the river and was drowned?
A. Yes, sir.
Q. I will ask you if he wasn't sent down by his employer to assist in lifting two motors?
A. Yes, sir.
Q. Who went with him?

A. Johnnie Cooper.

Q. What was his job?

41 A. He is a Mechanic's Helper. That is his rating. He was in there to help me.

Q. He was a white man, was he?

A. Yes, sir.

Q. If a colored helper, like George, would go out on some mission, the colored fellow would be subject to the orders of the white fellow?

A. Yes, sir; I suppose so.

Q. He had been out with you?

A. No, sir.

Q. He is shown to have been to the river on occasions with other people?

A. I don't know about that, but he never went with me.

Q. When he went out, he was subject to orders?

A. Yes, sir.

By Mr. FULTON:

Q. Mr. Lloyd, you were the mechanic up there, to do the mechanical work on the motors?

A. Yes, sir.

Q. Was George Armistead, the colored boy referred to here, was he a mechanic?

A. No, sir; he wasn't a mechanic.

Q. The work he did on the motor was cleaning it up?

A. After it was pulled down.

Q. To clean up the parts and wash them off?

A. Yes, sir; and dry them. I would take them and put them up and he would buff the tank—shine the tank—so it would look nice.

Q. And that was the only kind of work he did on the motor?

42 A. Except cleaning. I can't say he didn't take a nut off, but he didn't pull it down. Probably I remember the time that he would take a wrench and take the nut off, when he was waiting for the engine, to clean it up.

Q. His duties up there in the store was cleaning up the store and opening up the store in the morning, washing windows, cleaning motors, and driving automobile for making deliveries over town?

A. He had a schedule to go by.

Q. I will ask you to look at that and pass it over to Mr. Parrish.

A. I don't know whether it is the same one, but it is similar to it.

Q. Now, as a matter of fact, above the first floor of the store, was two apartments upstairs?

A. Yes, sir.

Q. Did George clean up those?

A. Yes, sir; and dump the trash.

Q. You said that looks like it?

A. It looks like it, I think.

Mr. Fulton. I would like to file that as Defendant's Exhibit No. 1.

Q. Now, in delivering any boats, small pleasure boat or outboard motors, would George drive the automobile down or conveyance down to make those deliveries?

A. He probably would, sometimes.

Q. He would go along to help do that?

A. Yes, sir.

Q. Who was the Mechanic's Helper at the time George was killed?

43 *Defendant's Exhibit No. 1*

Weekly Schedule for George P. Armstead, Jr.

Monday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean one-third of merchandise tables.

Tuesday:
1. Wash windows.
2. Clean boats and motors.

Wednesday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean second third of merchandise tables.

Thursday:
1. Clean boats and motors.
2. Wash front floor of showroom.
3. Wash washrooms.

Friday:
1. Wash front door (woodwork), desks, and floor in both offices.
2. Dust and clean third third of merchandise tables.

Saturday:
1. Wash windows.
2. Sweep shop and clean same.

Monthly Schedule

First of month:
1. Wash windows and skilights out back.
2. Clean front halls and steps.
3. Shine all brass stock.

4. Wash woodwork and walls in offices.
Fifteenth of month:
1. Wash woodwork and walls in offices:
2. Clean down back steps.
3. Clean front halls and steps.

44 A. Johnnie Cooper.

Q. Who was in charge of the office on the particular day George got drowned?

A. Mr. Hobbs.

Q. That gentleman sitting back there [indicating]?

A. Yes, sir.

By Mr. PARRISH:

Q. I notice on the schedule that two days a week he had to wash windows and clean boats and motors—Tuesday and Thursday—that is correct, isn't it?

A. Yes, sir; that is correct on it.

Q. There must have been right many motors on hand to require two days?

A. Outboard motors. After you have been over it, you can rub your hand over it and spot it and have to go over it every day.

By Mr. FULTON:

Q. Dusting them so they would look well?

A. Yes, sir; so they would look well to the public.

Q. They would be on the floor?

A. On stands.

Q. And he would go and dust them off?

A. Yes, sir.

By Mr. PARRISH:

Q. During the busy season, from April to August or September, you would have quite a few motors in the shop?

A. That isn't a particular busy season.

Q. When is the busy season?

A. In the Spring and in the Winter we are busy over-
45 hauling motors and I believe we are medium busy all the year.

Q. You had enough work to keep a mechanic and helper all the time?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. Would you have requests to go to work on boats?

A Service boats? I have done it.

Q. About how often would you do that; several times a week?

A. No, sir; it wouldn't average that; no, sir. The most we had was when the firm sold a Chris-Craft and would put it over board. My main job was outboard motors, but I have serviced a few engines.

Q. What would you have to do when you put them out?

A. All that happens is that it has to be slung and put out.

Q. How often would you do that?

A. One each week end for three week ends, and that is the largest number.

Q. But you did service them while the boat was in water?

A. Yes, sir; soon after you do that. We didn't pull it up and tie it to the dock.

Q. Did you test them?

A. The customer had to be on the boat, and we couldn't operate the boat and be in the cockpit.

Q. But you would do it?

A. Yes, sir; but the customer drove the boat.

Q. But you went along?

A. To adjust the carburetor or anything like that.

Q. How long was that boat?

46 A. One was thirty-five feet and the rest of them were much smaller. The average small boat would run from twenty-two to twenty-four or twenty-five feet.

Q. They would have larger motors?

A. Yes, sir.

Q. How large?

A. The largest have two 6-91 grade.

Q. Ninety-one horse power in each motor and there were two?

A. Yes, sir.

By Mr. PARRISH:

Q. When you would get a new boat in the water, there would be some adjustments to make before turning it over to the customer?

A. They come on the box car ready to run. They get at least three test runs in the factory.

Q. Before you finally delivered it, wouldn't you make some adjustments?

A. If it needed it. I was at the Chris-Craft Factory and they try it out and get it ready to run.

Q. You would go down and service some?

A. Some few.

By the DEPUTY COMMISSIONER:

Q. What would be the longest trip you made?

A. Fifty or sixty miles.

Q. Down the James and back?
A. Not on the James, but at West Point.
Q. Did you start from the Richmond dock?
A. No, sir. I would go down in the car.
Q. You would have to go in your car?
A. A majority of the time the customer took us in his car.
47 Q. How far would you go in the boat?
A. No special distance.
Q. Just run up and down to test it?
A. Had to do that.
Q. It would cover several miles?
A. It wouldn't cover several miles.
Q. And then you would be through and come back in your car?
A. Yes, sir.

By Mr. PARRISH:

Q. You would, on occasions, make trips to West Point and Tappahannock and other rivers?
A. In those directions, but not those points.
Q. On the Rappahannock River?
A. Yes, sir: some few jobs.
Q. Sometimes you would take a helper?
A. It depends.

By the DEPUTY COMMISSIONER:

Q. It was the same type of boat, thirty-five feet or smaller?
A. Didn't service that large a one but once; rest were smaller.

By Mr. FULTON:

Q. I understood you to tell the Court when a boat was sold by this company to a customer that it had been customary to have it tested at the factory, and he would take you down and have you present when the boat was put in the river, and he would operate the boat and not you?
A. What do you mean going down?
Q. On the trips?
A. On the water?
Q. You told him that you went down with the customer
47 and would be present when he would take the boat and go down for him and with him and be present when the engine was started and the boat was tried out?
A. Yes, sir.
Q. Did you run the boat or the owner?
A. The owner.
Q. All you did was simply to be there and make any minor adjustment?
A. We didn't drive the boat.

Q. That is what you went for?
A. Went more for pleasure.
Q. He sometimes wanted you to go?
A. Yes, sir.

By Mr. PARRISH:

Q. You got paid for the pleasure, didn't you, Mr. Lloyd?
A. Yes, sir.

By Mr. FULTON:

Q. In that case you didn't operate the boat; it wasn't the Motor Boat Sales, Incorporated, boat and you were simply present to see what was done?
A. It wasn't the Motor Boat Sales boat.
Q. It was the boat of the purchaser?
A. It wasn't the property of the Motor Boat Sales, because it was sold and was not on display.

By the DEPUTY COMMISSIONER:

Q. You would service it, if the company sent you down to service it?
A. Yes, sir; if it needed anything.
And further this witness sayeth not.

49 RANDOLPH HOBBS, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. Will you state your name and your age and by whom you are employed?
A. Randolph Hobbs; 28; employed by S. King Fulton, Inc.
Q. Washington?
A. Yes, sir; Washington, D. C.
Q. Were you employed by the Motor Boat Sales, Incorporated, on August 8, 1938, when it was said that George P. Armistead, Jr., got drowned?
A. Yes, sir.
Q. What were your duties up there?
A. I was Treasurer of the Corporation, in charge of the office, and more or less Store Manager, in charge of the general operation around the store itself.
Q. Was George Armistead employed there at that time?
A. Yes, sir.
Q. How long had you been employed by the Motor Boat Sales, Incorporated, at that time?
A. I had been with the Motor Boat Sales since May 1934.
Q. What was George employed as; what was he employed to do up there?

A. George was employed as a porter.

Q. Did he fill out the Social Security cards and send them in while you were there?

A. Yes, sir. While he was employed at the store the Social Security Act was put in effect.

50 Q. Would you know George's signature?

A. Yes, sir.

Q. I hand you paper here which is headed "Previous employment (last position first)," and what is known as a Social Security Card, to be filed with the Government and reporting to it; look at that and see if that is George Armistead's signature?

A. Yes, sir; I would say that is his signature.

Q. Would you pass that over to Mr. Parrish? The second line would be the item covering him.

Mr. PARRISH. What do you want to prove by that?

Mr. FULTON. He said what his position was at that time and his former position.

Mr. PARRISH. All right.

By Mr. FULTON:

Q. I want you to read into the record from that card. This is a copy of the card, duplicate original, and was filled out by you and filed with the Government?

A. Yes, sir.

Q. The card is headed "Previous Employment (last position first)," and under that Column four 6 17 36 Motor Boat Sales, Inc., 3 West Grace Street, Richmond, Virginia; position, Porter; rate of pay per week, $10.00; and that is then signed George P. Armistead, Jr.; is he same party that was drowned and about which the testimony has mentioned here?

A. Yes, sir.

Q. Was he a mechanic?

A. No, sir.

Q. Was he employed as a mechanic?

A. No, sir.

51 Q. Did he have any duties to perform as a mechanic?

A. No, sir; not as I recall.

Q. Did he have any duties to perform, either maritime operations in navigable waters—that is, the James River or other navigable streams? Was he employed to do any work of a maritime nature?

A. Was he employed for the purpose of working on the river?

Q. Any work on a river?

A. Porter in the store, primarily.

Q. You were there the day that George went down to the James River?

A. Yes, sir.

Q. What was he instructed to do, if you know, when he left your store?

A. George was instructed, to the best of my knowledge——

By Mr. PARRISH:

Q. Did you give the instructions?

A. No, sir.

Q. Were you present when they were given?

A. No, sir.

Mr. PARRISH. I object.

By Mr. FULTON:

Q. You don't know what he was instructed to do?

A. He was instructed to go——

By the DEPUTY COMMISSIONER:

Q. Who gave the instructions?

A. Perhaps I can clarify it.

By Mr. FULTON:

Q. What occurred?

52 A. To the best of my knowledge——

Mr. PARRISH. That is vague and indefinite. We want the facts.

The DEPUTY COMMISSIONER. Whether you remember it?

A. (Continuing.) These two gentlemen came by the store with their boat.

Q. What were their names?

A. Mr. Crown and his brother and we had these two motors at the store and it was agreed to let these two motors go down the river. Mr. Lloyd and I talked with Mr. Crown and we decided to let the motors go down the river to be operated on the back of Mr. Crown's boat. George Armistead, at the time, was instructed to go along to help lift these motors from the car to the boat—each of these motors weighed a little better than seventy-five pounds apiece—and to help load them in the car when they got through.

Q. Do what?

A. Load them back in the car when through.

Q. Help load and unload them?

A. Yes, sir.

Q. Did he have any directions to get in the boat to go in the river to do anything?

Mr. PARRISH. I object, unless it is shown that this witness instructed George Armistead.

By the DEPUTY COMMISSIONER:

Q. Did he have authority to give him instructions any other time during his employment?

A. Yes, sir.

Q. You were his immediate superior?

A. Mr. Todd and I and he worked for Mr. Lloyd.

53 Q. All three of you?

A. Yes, sir. If Mr. Lloyd wanted a motor carried anywhere or if anybody wanted a hand, George helped.

Q. You can state whether he was going down to the river and what he was going for?

A. He was not instructed to enter the boat.

Q. Any time?

A. No, sir.

Q. Did you see this boat these men were going to try out?

A. Yes, sir. I examined it on the trailer.

Q. Describe it?

A. It was fifteen feet long and of good construction, following along boats of that type. The boat was a V-bottom boat. That refers to the design of the boat and compares in average and is a fairly safe boat of its type. It conforms to the outboard run about.

Q. Did it have a cockpit and deck over the top of the boat?

A. It had a deck over the forward part of the boat and the rest of the way it was open, with seats, and the stern was fixed so it could be attached with an outboard motor.

Q. You don't know who gave him instructions to go down there?

A. Yes, sir; I think I do.

By Mr. FULTON:

Q. But you don't know of your own knowledge?

A. No, sir; I can't say I definitely know who gave him instructions to go down there.

By the DEPUTY COMMISSIONER:

Q. It would be you, Mr. Todd, or Mr. Lloyd?

A. Yes, sir. I must have given permission to take the

54 motors out of the shop and I gave that permission to Mr. Lloyd.

Q. Who went with him?

A. Cooper; Johnnie Cooper.

Q. He was a Mechanic's Helper?

A. Yes, sir.

Q. Did you instruct him to go down or somebody else to do that?

A. Yes. I didn't instruct Johnnie directly, but I gave my consent. Mr. Lloyd asked me if it would be all right for Johnnie to go and I gave my consent.

Q. He was allowed to go with your knowledge and approval, whether you consented or not?

A. Yes, sir.

Q. You didn't tell him what to do that day?

A. Not particularly that day, but George was instructed not to get on boats and he was particularly instructed about that, but sometimes he might do some work on motors. We didn't want him working on the mechanic's work; didn't want people to see him working on motors.

Q. He would have to get in the boat, if his job was to lift it in the boat?

A. Not particularly. The stern was pulled on the shore and the motor was attached to it.

By Mr. Fulton:

Q. You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?

A. No, sir.

By the Deputy Commissioner:

Q. Did he ever, for the benefit of the company or with your knowledge, act as watchman for any boats over night?

A. He acted as watchman on a thirty-five foot Chris-Craft we sold Mr. Warner Moore and he was paid by Mr. Moore and he was not there at our request and George stayed in the store and finished his work and was back the next morning.

Q. He wasn't your employee and the other man paid him and directed him what to do?

A. Yes, sir.

By Mr. Fulton:

Q. He never stayed on any boats for you?

A. No, sir.

By the Deputy Commissioner:

Q. You never sent him out on any mission of that kind?

A. To stay on a boat or run it?

Q. Yes, sir.

A. No, sir.

By Mr. Parrish:

Q. You stated that he worked in the store primarily. He would do anything that you told him?

A. Yes, sir; I think George would.

Q. The fact that he went out on this occasion, apparently under somebody else's instruction, shows that you sent him outside of the store on occasions?

A. Yes, sir.

Q. Mr. Hobbs, do you know who told him to go down the river on this occasion?

A. I can't definitely say that I do. I think Mr. Lloyd can.

Q. Generally, the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back off the boat in the car and back to the shop?

56

A. Yes, sir.

Q. It usually took two men?

A. Yes, sir.

Q. You weren't going to put both motors on at the same time?

A. No, sir.

Q. You were just testing them at the same time?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. You didn't send them down in a truck?

A. In Mr. Todd's car.

Q. How would you get a boat down there?

A. The Corporation has a trailer and take Mr. Todd's car.

Q. And tow them down there?

A. Yes, sir.

Q. Didn't George go on other occasions to take a motor and bring it back; how often?

A. No, sir; George was not there in the capacity of delivery boy. He would put motors in the car and deliver them to different parts of town. I can't recall another instance where George was sent to the river.

Q. You didn't send him down with instructions to put motors on the boat or lift them on the boat?

A. No, sir. He was purely in the capacity of strong-arm man, to help the mechanic get it from land to water.

By Mr. PARRISH:

Q. Who notified Jessie of George's death?

57

A. Mr. Todd. I think it was the undertaker first.

Q. From your company?

A. Mr. Todd.

And further this witness sayeth not.

WELFORD EARL LLOYD, a witness for the Defendant, having been recalled, testified as follows:

By Mr. FULTON:

Q. You have previously been called by the other side and testified that, on the day George Armistead was drowned, Mr. Crown or the two Messrs. Crown came by the Motor Boat Sales, Incorporated, and that they had on their trailer their boat, and that they came in to look at some outboard motors, being interested in

one to use on their boat; just what occurred with respect to your instructions; what did you instruct George Armistead with reference to his work?

Mr. PARRISH. He has testified to that. He testified that he didn't give him any instructions.

A. I didn't testify that I didn't give him any instructions.

By Mr. PARRISH:

Q. Tell us what you said.

A. Mr. Crown came by our place. He asked me to look at this new boat that he or his brother made. He looked at two engines in the garage; one was an Elto and one was a Johnson; and I don't know whether I said first or Mr. Crown that I would like to try the motors in the boat. The motors, both of these were too large to put in the test barrel at high speed, because they would throw the water out. We wanted to try them, as I testified, and I went to Mr. Hobbs and asked him could he send them down to the river and help him.

By Mr. FULTON:

58 Q. What did you tell George Armistead to do?

A. He was instructed to get the equipment ready for any trip I was going on. George was instructed to help Johnnie take it off the trailer and help put in on the boat, but he was not instructed to ride on the boat.

Q. That was the instructions?

A. Yes, sir.

Q. And he left the store under those instructions? Had he authority or direction from you, while there, to go out on the river riding in a boat that was operated in deep water?

A. Not any kind of water. The majority of times he would leave the store he would deliver a motor around town which had been repaired.

By the DEPUTY COMMISSIONER:

Q. He was instructed to help get the motor out of the trailer to the boat, and when through, reverse the procedure?

A. Yes, sir; that is right.

By Mr. PARRISH:

Q. As well as you can recall, Mr. Lloyd, what was said by you to George when he left to go down to the river on this occasion?

A. Well, I suppose——

Q. I asked you what you said, not what you supposed?

A. As well as I recall, I either told Johnnie to take George or I told George to go and help. I can't say whether I told George or Johnnie.

Q. You don't know whether you gave the instruction to George or Johnnie?

A. I don't know. Usually I may have told George. I
59 wouldn't transfer the message through the other.

Q. Was that as far as your instructions went; to take the equipment down and after it was tried out bring it back?

A. Yes, sir.

And further this witness sayeth not.

WILLIAM CROWN, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. Are you one of the Messrs. Crown that went to the Motor Boat Sales, Incorporated, on August 8, 1938, with a boat?

A. I am the only Mr. Crown that went by there.

Q. And you were the party that went by?

A. Yes, sir.

Q. And that boat was yours?

A. No, sir; it was my brother's. I had charge of it at that time.

Q. You did take it on your trailer to the James River?

A. Yes, sir. We had the boat built. My brother built it. He was a mechanic. I wanted to show it to Mr. Todd and Mr. Lloyd. We got acquainted with them through our four-cylinder Elto motor that we had. We put it on the trailer and I carried it by the Motor Boat Sales and pulled up in the back alley and went in and told them I had something I wanted them to see, and they came and looked it over. I wouldn't say for sure, Mr. Lloyd or Mr. Hobbs—either one or the other of them, I don't know which way it came up—said they had two motors to try out, and I took the boat on the trailer and we made arrangements to meet at the river at two o'clock, and, in the meantime, I goes to the
60 shop where my brother worked, Sash Door and Glass, and told my brother what arrangements I made, and he was anxious to see it, and he got the boss to let him off. He called the other people, the Miller Manufacturing Company——

Q. You needn't tell about that?

A. He got off and went down. I don't know whether we got there first or George and Johnnie, and we took the boat and put it in the river, and one end of it was in the river and one end was on the bank. It was too heavy for one man to get on the boat and put the motor on, and George stands on the bank and lifted it on the boat to clamp on it and shove it in the water to right it.

Q. Was George Armistead told by you or by Mr. Johnnie Cooper, the boy that went from the Motor Boat Sales down, to get in your boat and ride, or was he ordered and directed not to?

A. Yes, sir.

Q. Did he have any work to do on the boat?

A. None at all.

Q. You were present when he was told to go down with these motors?

A. Yes, sir.

Q. And you were present when they got down there?

A. Yes, sir.

Q. And you never heard anyone tell George to get in the boat and ride?

A. No, sir.

Q. Was it your boat that capsized in the river when George was drowned?

A. Yes, sir. The boat was coming straight up the river
61 and it hit something and turned towards the Manchester side, and that is the side that George went out and Johnnie went out toward Richmond, and George made a couple of strokes, like he was going to swim to the Manchester side, and Johnnie went towards Richmond and he got back towards the boat, and it didn't seem like George got a good hold on the boat. It was on an angle, the nose of the boat was upside down, and it drifted down the river like that, because the weight of the motor held the stern down.

By Mr. PARRISH:

Q. What kind of rigging did you have on the boat for the motor?

A. It was just an outboard motorboat. It was made to clamp on an outboard boat.

Q. Did you have any forward control?

A. No, sir.

Q. One man couldn't put the motor on?

A. Not very handy; could if he was a good man.

Q. He would have to be a big strong man?

A. He would have to have a good bit of strength, but we didn't take a chance.

Q. Did you see the accident?

A. Yes, sir.

Q. Were you there when they went out?

A. Yes, sir.

Q. How did they happen to go out in the boat?

A. Like I said at first, we wanted to try it and they had gotten down there and they put the Johnson motor on and tried it and went on and rode the river and——

Q. Who went on that trip?

A. All four of us. There was a rock or a rock pile in the river.

62 Q. Big rock in the river about opposite the City wharf?

A. Yes, sir. They went just this side the rock and turned around then and came in and I looked at my watch and I didn't have much time and they had an Elto motor they wanted to try.

Q. You took the other one off?

A. Took the Johnson off and put the Elto on and we had a little trouble getting it started. The battery was weak, one of them, and they took the battery out of our car and tried to borrow one from the Little Oil Company and couldn't get one and took it from our car and Johnnie and George went out in the boat.

Q. You didn't have time to go?

A. I didn't have time to go, but I stayed there to bring the boat home. It was built to move anywhere you wanted to take it. They put the Elto motor on and made the trip and came back to the bank and wanted me and my brother to go. I told them "no," and they had a little gas to burn in the carburetor and they made another trip up the river and down the river; I don't know how far and they were coming back up the river and got in between the Little Oil Company and the Standard Oil Company's warehouse, the boat was coming up the river and hit something and it was knocked loose on the bottom, not enough to sink, but we had to repair it when we got it home. We took some clamps and some wrenches and fixed it.

Q. Were you there when they got there with the motors?

A. I don't know.

Q. But it was approximately the same time?

A. I might have been there first.

Q. Whichever got there first would have to wait?

A. Yes, sir.

63 Q. And Johnnie and George put the motors on?

A. Yes, sir.

Q. And then went through the trips you have explained?

A. Yes, sir.

By Mr. FULTON:

Q. You put the motor on the end?

A. Yes, sir. George had hold of the propeller and Johnnie had hold of the motor, inside the boat. He had to clamp it on.

Q. And the outside of the boat was standing on land?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. You said something about righting the boat.

A. Righting the motor. It was standing on a slant.

Q. Who put the boat off the bank?

A. All four of us.

Q. Was George in the boat?
A. He was helping us.
Q. Did he hop in?
A. He got in.
Q. I am talking about the second time they took the trip.
A. I don't think George got out.
Q. I understood you to say he was on the bank and the other fellow was inside?
A. When they hooked it first Johnnie was inside and George was outside. Johnnie got in the boat and George handed the motor over and held the propeller and he clamped it.
Q. That was the first trip?
A. Yes, sir.
64 Q. About the second trip; how about that? Were you still there?
A. Yes, sir. I don't know whether George took the battery out there or Johnnie or one of us. The boat was in the water.
Q. The boat was in the water?
A. Yes, sir.
Q. When it was on the bank was the first trip?
A. Yes, sir.
Q. Were you figuring on buying it, if you liked it?
A. I don't know whether I was figuring on buying it or not, but right now we own the motor.
Q. You had some interest in it?
A. In the Johnson motor.
Q. They were quite interested to sell?
A. To see whether the boat would carry the motor.
Q. They were interested in selling a motor?
A. That is true. They had two motors and they didn't have any way to test them in the shop.
Q. Two men were down on company business; we can agree on that.
A. No answer.
And further this witness sayeth not.

JOHN SAMUEL COOPER, a witness for the Defendant, having been duly sworn, testified as follows:

By Mr. FULTON:

Q. State your name and your age.
A. John Samuel Cooper and I am twenty-one.
Q. Where were you working on August 8, 1938?
A. Motor Boat Sales.
65 Q. How long have you been working for them?
A. I went to work March 15th.
Q. 1938?

A. Yes, sir.

Q. And you had been working for them from that time on up through August 1938?

A. Yes, sir.

Q. You are still working for them?

A. Yes, sir.

Q. And have been with them ever since?

A. Yes, sir.

Q. What were you employed to do?

A. I was to help Mr. Lloyd, the mechanic. I worked on motors and repaired motors; helper to Mr. Lloyd.

Q. Helper to Mr. Lloyd?

A. Yes, sir.

Q. What were George Armistead's duties?

A. Wash up motors and polish them and general helper, and in the mornings, sweep in the store.

Q. You heard Mr. Lloyd testify, and that was his testimony?

A. Yes, sir.

Q. You also heard Mr. Hobbs testify as to that?

A. Yes, sir.

Q. On that day, August 8th, that Mr. Crown came by, what was George Armistead, the colored boy that was later drowned, what was he going with you down the river for?

A. To help me.

Q. Do what?

66 A. Take the motor off the trailer and put it on the boat and take it off when finished.

Q. Did he have any duties in running a motor on out in the water?

A. Not to my knowledge.

Q. Did you instruct him to get in the boat or did he go on his own accord, for a pleasure ride?

A. He went on his own accord.

Q. You were up there when you were told to take the motor down and he went along to help unload the motors from the trailer and attach them to the boat and take them and put them back in the trailer?

A. Yes, sir.

Q. And they were his sole duties?

A. Yes, sir.

Q. You heard what was said to him?

A. Yes, sir.

Q. You never gave him any and you didn't hear anybody give him any duties to go on water?

A. Not to my knowledge.

Q. When these motors were taken off the trailer and each one was attached to the boat, where was the end of the boat?

A. Sitting on the shore, like Mr. Crown said.

Q. Was that true when you took the Johnson motor off the boat and put the other motor on, that the boat was pulled up on the shore and one motor was taken off and the other motor was put on?

A. Just the back end was out of the water. The whole boat was not out of the water; just the back end.

Q. At the time the accident happened, who was driving the boat?

A. I was driving the boat.

67 Q. What caused it to turn over?

A. Striking some object.

Q. Was the river clear or muddy?

A. Muddy.

Q. The boat capsized and threw you and George out and you hung on the boat until rescued?

A. Yes, sir.

By Mr. PARRISH:

Q. Mr. Cooper, you were present when Mr. Crown testified, weren't you?

A. Yes, sir.

Q. You heard all of his testimony?

A. Yes, sir.

Q. It is true that the four of you took the first trip with the Elto motor?

A. With the Johnson motor.

Q. And who took the second trip, you and George, with the Elto motor?

A. Yes, sir.

Q. You apparently put the motor on to try it out?

A. Yes, sir.

Q. You couldn't put it on alone?

A. No, sir.

Q. George helped?

A. George and Mr. Crown.

Q. You didn't tell George not to get in that boat on either occasion?

A. No, sir.

68 By Mr. FULTON:

Q. You didn't tell him to get in the boat?

A. No, sir.

Q. He had no instructions to operate the boat on the river?

A. No, sir.

By Mr. PARRISH:

Q. He had no instructions either way?

A. No, sir.

The DEPUTY COMMISSIONER:

Q. You said the motor was put on when they had taken it to the bank?

A. Yes, sir.

Q. If they attached it to the boat out of the water, how would you get it in the water?

A. Mr. Crown and his brother helped shove it off.

Q. Where was George when you were getting it pushed overboard; do you recall?

A. The first trip?

Q. Second one?

A. He was in the boat.

Q. He didn't get out?

A. He possibly got out to help get the battery and put that in the boat.

Q. Did he help take the first motor off and put the other one on?

A. Yes, sir.

Q. What was the purpose of the second trip?

A. To try the motor out and see how it operated.

Q. You could handle it all right whether by yourself or
69 with somebody else?

A. Yes, sir.

Q. He didn't do anything to assist you?

A. No, sir. He did sit in the front and keep a lookout.

Q. What was the purpose of that?

A. The water was muddy and to see if he saw anything.

Q. Was that necessary or helpful to you?

A. It was helpful.

By Mr. FULTON:

Q. Did you give him any orders to sit in front?

A. No, sir.

Q. There was a seat up front and he was sitting there?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

Q. And he was to be there until you were ready to go back to the store?

A. Yes, sir.

By Mr. PARRISH:

Q. What sort of battery was this?

A. Six volt.

Q. Automobile battery?
A. Yes, sir.
Q. Is that the sort of battery you had to start it with?
A. Yes, sir.
Q. Did you have two batteries there?
A. Yes, sir.
Q. The first battery was not powerful enough to start it?
A No, sir.
70 Q. And that was put on the boat?
A. In the boat.
Q. Did you hook the two batteries up?
A. I believe we did hook them up.
Q. Was it necessary for George to help hook them up?
A. I did it myself.
Q. Could you start the motor by yourself?
A. Yes, sir. There wasn't room for but one and I could start it.
Q. It was hooked up by cable?
A. Yes, sir.
Q. The ordinary cable, does it have connections so you can hook up two batteries?
A. The ordinary cable you can hook two batteries if you have the tools and a piece of wire.
Q. A battery has two poles?
A. Yes, sir.
Q. The ordinary cable does not have two connections?
A. Yes, sir.
Q. You can have three connections?
A. Three separate cables.
Q. How would you hook them up?
A. One cable runs to the positive side. That went to the starter and switch on the motor, and the other one went to the ground of the motor.
Q. How did you hook the other positive and negative?
A. With a cable.
Q. Who held that cable?
A. It was stationary.
71 By Mr. FULTON:
Q. That was a small boat; about what would it weigh?
A. I wouldn't like to have to say. Around about 200 or 225 pounds. It is hard to judge the weight of a boat.
Q. The Motor Boat Sales never sold an eighteen-ton cruiser while you were up there?
A. No, sir.

By the DEPUTY COMMISSIONER:

Q. How often did you go down to work on boats?

A. Not very often. This was the first time I had been down for some time.

Q. Did you go on other trips?

A. No, sir; I had a boat of my own.

Q. Did you go for the company on similar jobs, to put a motor on a boat or to test it out?

A. Not that I remember.

Q. This was the only time?

A. Yes, sir.

And further this witness sayeth not.

S. KING FULTON, a witness for the Defendant, having been duly sworn, testified, as follows:

By Mr. FULTON:

Q. State your name and what connection you had with the Motor Boat Sales, Inc., on August 8, 1938, and prior thereto?

A. S. King Fulton: I was President of the Corporation in August 1938. I was inactive, because I was in business in Washington, but I made a trip down occasionally; one or two trips a months; periodic trips.

Q. Did you hire this boy, George P. Armistead, Jr., who
72 got drowned on August 8, 1938?

A. I did.

Q. How long had he been with the Company?

A. I think since 1936 or 1937; two or two and one-half years.

Q. What were his duties?

A. He was a porter. We had a porter that lived on the premises, but when George took the job, he was married, and he did not live on the premises. He was a porter and operated under my supervision and in December 1937, at which time I went to Washington——

Q. Were his duties ever changed? You went backward and forward.

A. No, sir.

Q. What instructions did you give him and other employees, generally, when they delivered things, about going in other people's boats?

A. George was cautioned never to go into a boat or have anything to do with a boat or motor, as explained by Mr. Hobbs. The class of boat we sell our customers does not demand a sale's technique. I had very rigid rules in regard to handling boats. Prior to November 1 I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling.

Q. What was your ruling: not to go out in rivers or boats for anybody?

A. Yes, sir.

By Mr. PARRISH:

Q. When did you lay down that law? Prior to December 1937 when you went to Washington, wasn't it?

A. Yes, sir.

By the DEPUTY COMMISSIONER:

73 Q. What is the general nature of your business? Perhaps I do know it, but I would like to get it in the record.

A. We sell boat supplies, maritime supplies, motors for outboard boats, and outboard boats and rowboats, sailboats, and cruisers.

Q. To what extent did you deliver them on board vessels?

A. They are new boats and they come in on flat cars. All boats we sold were put overboard by the Richmond Sand and Gravel Company, and the owner went aboard, and when I was here I went, and in some cases the mechanics went, but when I was at the boat. The only thing that had to be put on the boat was the propeller. The boat came on a flat car, and the reason that was not on was because it might get broken. It was put on on the flat car, and the Richmond Sand and Gravel Company picked them up with a crane and dropped them overboard.

Q. You had nothing to do with unloading them?

A. No, sir. We contracted with the Richmond Sand and Gravel Company to do that.

Q. When you furnished supplies, did they get them?

A. They did. The boats were well equipped.

Q. If I owned a boat a year or two and wanted some work done on it, would you do it?

A. Very few boats were kept in Richmond since 1937, when they obsoleted this harbor. We didn't have a delivery truck; and if they wanted to bring them down, we would work on them. If it suited them to bring the boat down, we would work on it.

Q. Would your salesmen take a boat out?

A. Not to my knowledge.

Q. What would a person do if he wanted to see the boat on the river?

74 A. The owner would, if he liked the boat, get somebody that had one to take him.

Q. You sell these boats?

A. Yes, sir.

Q. If you wanted to interest people, you would take them out and run them around the harbor?

A. The boats are not here.

Q. I thought perhaps——

A. Take Warner Moore and Doctor Herring; they would invite the customer and show them the boat. The big boat would sell themselves, and there is not much the salesman can do except point out certain advantages.

Q. You didn't feel that your work was such that you had to have coverage under our Longshoremen's and Harbor Workers' Compensation Act?

A. The boats were insured until they were put overboard.

Q. I am talking about compensation coverage.

A. I don't know. I couldn't answer that. Mr. Hobbs could answer that.

By Mr. FULTON:

Q. Did you handle any boats weighing eighteen tons, such as are referred to in Section three?

Mr. PARRISH. Is that material?

The DEPUTY COMMISSIONER. I don't think it is material, because the requirement is that for a vessel under eighteen tons the person going aboard must be engaged by the master.

Mr. FULTON. I want to show that he had a small boat.

Mr. PARRISH. We will admit that.

The DEPUTY COMMISSIONER. That may be subject to our Law. Is that all?

75 Mr. FULTON. That is all.

By Mr. PARRISH:

Q. Mr. Fulton, you have delivered a good many boats in Richmond?

A. Yes, sir; and quite a few throughout Virginia.

By the DEPUTY COMMISSIONER:

Q. Did this man have occasion, under your direction, to act as watchman?

A. I was here when that specific case came up that they mentioned. I took Mr. Warner Moore and carried him to the Chris-Craft factory and he saw the boats in action and bought one and I can state definitely that I did not allow him to go on board the boat. George was a fine colored boy.

By Mr. FULTON:

Q. Was he employed to work on a boat?

A. No, sir.

Q. It has been in evidence that he acted as a night watchman.

A. Warner Moore engaged him.

Q. Who employed him to act as night watchman?

A. Warner Moore, Jr., he employed him.

And further this witness sayeth not.

The DEPUTY COMMISSIONER. Do both sides rest?

Mr. PARRISH. Yes, sir.

Mr. FULTON. Yes, sir.

Mr. PARRISH. I overlooked filing the burial expense.

The DEPUTY COMMISSIONER. We have it.

Mr. PARRISH. That is considered a part of the record?

The DEPUTY COMMISSIONER. Yes, sir. Would you gentle-
76 men like to write briefs? This is a new point.

Mr. FULTON. We would like to.

Mr. PARRISH. When would they have to be in? I have a lot of court engagements.

The DEPUTY COMMISSIONER. How about the 10th of November?

Mr. PARRISH. Both file briefs by the 10th of November?

The DEPUTY COMMISSIONER. Yes, sir.

Mr. FULTON. I have some matters that will take me out of town some. I would like to have his brief first.

The hearing was thereupon concluded.

[Reporter's certificate to foregoing transcript omitted in printing.]

78 *Claimant's Exhibit 1*

Form U. S. 264

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION	Leave this space blank.
Office of Deputy Commissioner .... Administering Longshoremen's and Harbor Workers' Compensation Act	Case No. 25-1. Insurance Carrier's No. None.

PROOF OF DEATH

(By Physician Last in Attendance on Deceased)

NOTE.—Verification of this report may make it unnecessary for the physician making the same to attend hearing as a witness.

1. Name of the deceased in full, George Percell Armistead, Jr. Address, 22 E. Hill St., Richmond, Va.

2. Age at death, 24 years. Married or single? Married.

3. Name of employer, Motor Boat Sales, Inc. Address, 3 W. Grace St., Richmond, Va.

4. How long have you been medical adviser of deceased?

5. Date of accident or first illness, August 8, 1938. Date of death, August 8, 1938.

6. Date of your first visit ..... 192.. Date of last visit ..... 192..

7. Place of death (give street number, city or town, and state), James River, at Richmond, Va.

8. Who engaged your services? City Coroner.

9. State in patient's own words how accident occurred or occupational disease was caused:

10. Give a complete and accurate description of nature and extent of injury or occupational disease, as you found it upon first and subsequent examinations: Drowned accidentally while riding in motorboat which overturned.

11. State the direct cause of death: Drowning.

(Let your answer be explicit and complete)

12. In your opinion, was the accident or occupational disease as above described a cause either directly or indirectly of the death?

13. Give contributory causes, if any:

14. If coroner's inquest held, give coroner's name and address: Dr. George Williams, Richmond, Va.

15. Was deceased attended by any other physician during last illness? If so, name and address:

16. I am a physician duly licensed in the State of Virginia, and graduated in the year 1931 from University of Colorado Medical College.

(Sgd.) GEORGE Z. WILLIAMS,
Coroner, Attending Physician,
Address, Richmond, Va.

Dated October 20, 1938.

79 STATE OF VIRGINIA,
City of Richmond, ss:

George Zeer (?) Williams, being duly sworn, deposes and says: That he is the physician who subscribed to the above (or attached) report; that he has read the same and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 20th day of October 1938.

[SEAL] (Sgd.) ELINOR I. JOHNSON,
Notary Public.

My commission expires January 21, 1941.

This blank must be signed personally by the attending physician or in hospital cases personally by the superintendent.

IMPORTANT.—All questions to be fully answered. 9-1231. U. S. Government Printing Office.

80 *Exhibit B*

(NOTE.—For Exhibit B, filed March 29th, 1940, in the hearing before the United States District Court, see page 9.)

81 In United States District Court

No. 1507-M

MOTOR BOAT SALES, INCORPORATED

vs.

E. V. PARKER, DEPUTY COMMISSIONER, and JESSIE BOOKER ARMISTEAD AND OTHERS

Memorandum by the Court

Filed June 11, 1940

This is a suit to review an award of compensation made under the Longshoremen's & Harborworkers' Compensation Act, Title 33, Sections 901-950, U. S. C. A. George P. Armistead, Jr., an employee of Motor Boat Sales, Incorporated, was drowned in James River at Richmond, Virginia, on August 8, 1938. Jessie Booker Armistead, widow of George P. Armistead, Jr., filed a claim with the United States Employees' Compensation Commission against Motor Boat Sales, Incorporated, asking for an award of compensation under the said Act. A hearing was had before a Deputy Commissioner for the Fifth Compensation District, who made findings of fact and an award of compensation to the claimant and her dependents. This suit was then instituted pursuant to Section 921 to permanently enjoin the said award. By order of Court the claimants before the Deputy Commissioner were allowed to intervene.

The Act affords compensation to certain marine workers "for accidental injury or death arising out of or in the course of the employment." The Act provides that the term "employer" includes "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

The complainant alleges many grounds why the award should be permanently enjoined. Some of these grounds were not raised before the Deputy Commissioner, and many of them do not merit serious consideration and were actually abandoned at the hearing before the Court.

The constitutionality of the Act is questioned. The Act was held to be constitutional by the Supreme Court of the

82 United States in the case of Crowell v. Benson, 285 U. S. 22.

Section 903a of the Act provides that compensation may be awarded only if the accident occurred upon navigable waters of the United States and if recovery through workmen's compensation proceedings may not validly be provided by state law. It is not denied that the accident occurred upon navigable waters of the United States, and it would seem that the Virginia Workmen's Compensation Act is not and could not be made applicable to a case such as this. See Southern Pacific Company v. Jenson, 244 U. S. 205; Noguira v. New York, New Haven and Hartford Company, 281 U. S. 138; Johnson v. Elliott, 152 Va. 121; and the documents of the Industrial Commission of Virginia in Irwin v. Friend & Company, 12 O. I. C. 490.

It is contended that the compensation order, findings of the Deputy Commissioner and award are not in accordance with law. The proceedings of the Deputy Commissioner conformed to the statute. Congress has power to invest the Deputy Commissioner with authority to determine whether the death arose out of and in the course of the employment, and when the Deputy Commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by the evidence are deemed to be conclusive. Doehl v. Indemnity Insurance Company, 288 U. S. 162.

But it is contended that the finding of the Deputy Commissioner that there existed the employer-employee relation necessary for an award under the Act is without evidence to support it. It is not denied that there existed between the complainant and Armistead the ordinary relation of master and servant, but it is contended that the death of Armistead did not arise out of or in the course of the employment and that the complainant was not an employer any of whose employees were employed in maritime employment, in whole or in part. I think that the finding of the Deputy Commissioner on these points is supported by the proofs. In this connection the name of the complainant company and the very nature of its business are significant. Not only

83 is the company engaged in the business of selling boats, motors, and marine supplies, but it also serviced and demonstrated its boats and motors on navigable waters, and its employees also operated its boats for long trial trips before they were sold. It is true that Armistead was employed as a janitor and handyman in the store and that while working there he took his orders from Mr. Todd. However, when performing services outside the store Armistead was subject to the orders of the white employee he was assisting. On one occasion in question he was sent to the river with Cooper with instructions to help Cooper

and while there was subject to the orders of Cooper. The object of the trip to the river was to demonstrate for the purpose of making sale thereof a motor belonging to the company. After helping Cooper to attach the motor to the boat and to connect the batteries, Armistead went with Cooper on a trip "to try the motor out and to see how it operated." While Cooper did not order Armistead to go with him on the trial trip, Armistead was in the boat with the consent and approval of Cooper who for the time being was his boss. And at the very moment that the boat capsized Armistead was keeping a lookout for Cooper who was operating the boat. Under such circumstances it cannot be successfully contended that Armistead's death did not arise out of or in the course of work he was employed by the company to perform or that the company was not an employer any of whose employees were employed in maritime employment.

An order refusing to enjoin the award and dismissing the complaint may be presented after notice.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JUNE 11, 1940.

84 In United States District Court

Motion of plaintiff for leave to reargue case, etc.

Filed June 24, 1940

This day comes the plaintiff, Motor Boat Sales, Incorporated, and moves the Court to be allowed to reargue the above cause and for a rehearing of the same, on the grounds and for the reasons:

1. That the Longshoremen's and Harbor Workers' Act has two fundamental limitations:

(1) It deals exclusively with compensation in respect to disability or death resulting from an injury occurring upon navigable waters of the United States, if recovery through workmen's compensation proceedings may not validly be provided by state law; and

(2) It applies only when the accidental injury or death arises out of and in the course of employment of the employee in maritime employment, in whole or part, upon such navigable waters, and the Act as construed in this case by the District Court is in violation of the Constitution of the United States in that it holds that the Congress may substitute for Constitutional courts, in which the judicial power of the United States is vested, an administrative agent, namely, a single Deputy Commissioner, for the final determination of the existence of facts upon which the enforcement of

the Constitutional rights of the plaintiff depend, and in that it holds that there is no limitation of such Deputy Commissioner's power to determine the fundamental facts and thus oust the Court of the determination of such facts by vesting the authority to make them with finality in such Deputy Commissioner or administrative agency, thereby destroying the judicial power as it exists under the Federal Constitution and makes the findings of such agencies in effect finality as to law.

85 (3) That the findings of the Deputy Commissioner are not in accordance with law and are not supported by the evidence and are without evidence to support them, as appears from the record, and that this Court has erred in deeming such findings conclusive under the facts and law in this cause—all the uncontradicted evidence showing that George P. Armistead, Jr., the decedent's, injury and death did not arise out of and in the course of his employment, and that he was not employed to work upon navigable waters of the United States and that his employment was not of a maritime character, and at the time he was drowned he was not performing any duties he had been employed or directed to do, and that the matter of his death was local and not related to navigation or commerce, and the relation of master and servant did not exist pro haec death; and

(4) That the death of George P. Armistead, Jr., did not fall within the coverage of the Longshoremen's and Harbor Workers' Act; that there was no basis for such recovery under said Act and in admiralty.

For the above and other reasons appearing in the Bill of Complaint and Record, the plaintiff moves the Court to be allowed to reargue the above cause and for a rehearing of the same.

This June 24, 1940.

MOTOR BOAT SALES, INCORPORATED,
By (Sgd.) M. J. FULTON,
M. J. Fulton,
Its Counsel.

86 In United States District Court

[Title omitted.]

Order refusing reargument, etc.

Entered and filed June 24, 1940

This day came the plaintiff, Motor Boat Sales, Incorporated, and moved the Court to be allowed to reargue the above cause for reasons set forth in writing and hereby filed.

It appearing that the grounds and reasons for the motion to reargue its said cause have heretofore been argued and considered by the Court, the motion to reargue is hereby overruled and denied, to which action of the Court the complainant, by counsel, excepted.

(Sgd.) ROBT. N. POLLARD.
United States District Judge.

JUNE 24, 1940.

87 In United States District Court

Miscellaneous No. 1507

MOTOR BOAT SALES, INCORPORATED, COMPLAINANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, and JESSIE BOOKER ARMISTEAD ET AL., DEFENDANTS

Final decree

Entered and filed June 25, 1940

This cause came on this day to be heard on the bill of complaint, the motion to dismiss and the answer of the defendant, E. V. Parker, Deputy Commissioner, and on the petition, the motion to dismiss and the answer of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead, they having intervened in this cause as parties defendant by leave of Court, and on the motion to dismiss and answer of Aubrey N. Heflin, guardian ad litem for the said infant defendant, and on the award of E. V. Parker, Deputy Commissioner, rendered in this matter, and on the transcript of the evidence and the record of the hearing before the said Deputy Commissioner, and exhibits filed therewith, said award and transcript of the hearing having been filed with the answer of the said E. V. Parker, Deputy Commissioner, and was argued by counsel:

And the Court being of opinion that The Longshoremen's and Harbor Workers' Compensation Act, under which this proceeding was instituted as an equity suit, is a part of the maritime law of the United States, and that the jurisdiction conferred on the Courts of the United States by said Act is admiralty jurisdiction, it is now ordered that this cause be henceforth proceeded with as an admiralty cause, and that the pleadings heretofore filed by the several parties under the designations applied to such pleadings in an equity suit be treated as pleadings filed by the several parties under the designations applied to pleadings in an admiralty cause.

And the Court having maturely considered the matter, and being of opinion for reasons set forth in the Court's memo-
88 randum heretofore filed in this cause and hereby made a part of the record, that the jurisdiction of the Commissioner and the award made by him in this matter are supported by the evidence and are in accordance with law,

It is adjudged, ordered, and decreed that the libel herein be, and it is hereby, dismissed, at the cost of the libelant, to which action of the Court in dismissing the libel, the libelant, by proctor, objected and excepted.

And it further appearing to the Court that the respondent, Jessie Booker Armistead, has filed in writing her consent to the allowance of an additional fee of Two Hundred and Fifty ($250.00) Dollars to the firm of Parrish, Butcher and Parrish, for services rendered Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkeley Armistead in this suit, and that the said Aubrey N. Heflin, guardian ad litem of the infant respondents, Dorothy Marian Armistead, George Percell Armistead III, and William Berkeley Armistead, has committed the interests of the said infant respondents to the Court in respect to the allowance of proctor fees, and it appearing to the Court that a fee of Two Hundred and Fifty ($250.00) Dollars for the services of Messrs. Parrish, Butcher and Parrish in this Court is reasonable, the same is hereby approved and confirmed, and it is adjudged, ordered, and decreed that the allowance of the additional sum of Two Hundred and Fifty ($250.00) Dollars shall be a lien upon the award of compensation.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JUNE 25, 1940.

Due service and receipt of a copy of the within proposed final decree is hereby admitted this 24th day of June 1940.

(Sgd.) M. J. FULTON,
Proctor for Libelant.

89 RICHMOND, VIRGINIA,
June 15, 1940.

MR. R. R. PARRISH,
c/o Parrish, Butcher & Parrish, Richmond, Virginia.

DEAR MR. PARRISH: Following your discussion with me of the amount of fee to be allowed you for representing me and the infant dependents of my deceased husband, George Armistead, Jr., I wish to advise that the allowance of a fee of $250.00 to you by the Court will be satisfactory to me. I understand that the amount of fee to be allowed you is in the discretion of the Court,

and that if I had any objection to the amount I would have the right to appear before the Court and state my objections. Under all of the circumstances, I think such an allowance for services rendered me and my children would be reasonable. It is satisfactory to attach this agreement to any decree or judgment which may be entered by the Court evidencing my approval.

Very truly yours,

325 (Sgd.) JESSIE ARMISTEAD.

90 In United States District Court

Petition for appeal

Filed July 8, 1940

The petitioner, Motor Boat Sales, Incorporated, hereinafter referred to as complainant, by S. King Fulton, its President, respectfully represents:

1. That it is a corporation organized under the laws of the State of Virginia, and duly authorized and licensed to transact business in said State of Virginia, which is within the jurisdiction of the District Court of the United States for the Eastern District of Virginia; and that it has authorized the taking of this appeal:

2. That the defendant, E. V. Parker, is Deputy Commissioner for the Fifth Compensation District of the United States;

3. That the complainant herein was defendant in proceedings before said Deputy Commissioner in a claim for compensation made against it on behalf of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead, the alleged dependents of George P. Armistead, Jr., deceased;

4. After the claim was duly filed by the alleged dependents of said George P. Armistead, Jr., with the defendant, E. V. Parker, Deputy Commissioner, and the complainant therein, made answer and defense thereto, the defendant, E. V. Parker, Deputy Commissioner, held a hearing thereon and, after duly swearing the witnesses, heard their testimony on January 17th, 1940, and the said defendant, E. V. Parker, Deputy Commissioner, on January 17, 1940, made certain findings of fact and entered an order on the complainant herein to pay compensation, under the Longshoremen's and Harbor Workers' Compensation Act;

5. That thereafter the complainant therein filed a Bill of Complaint in the above Court asking that the action of
91 said Deputy Commissioner, E. V. Parker, be reviewed for the matters and reasons therein set forth, and that he be enjoined from enforcing said order, and to set aside certain findings of fact therein mentioned:

6. That a motion to dismiss and an answer to said Bill of Complaint were filed by the defendant, E. V. Parker, Deputy Commissioner; the dependents of George F. Armistead, Jr., deceased, filed a petition and by leave of Court were made party defendants to said Bill of Complaint, and after a hearing upon the evidence and record introduced before the said Deputy Commissioner and after argument thereon the above Court, through Robert N. Pollard, U. S. District Judge, filed an opinion in which it was indicated that a decree dismissing the Bill of Complaint could be submitted. The Court thereupon transferred the cause to the admiralty side of the Court:

7. That thereafter the complainant, after leave of Court, filed a motion for leave to reargue the above cause, which motion for reargument came up for hearing in due course, and after consideration by the Court was dismissed, to which action of the District Court complainant excepted, and the Court, through Robert N. Pollard, Judge, filed an opinion in which it was indicated that a decree dismissing the decree could be submitted and would be filed for the reasons set forth therein, which opinions have since been made a part of the record:

8. Thereafter, in conformity with the opinion of the Court referred to, a decree dismissing the Bill of Complaint has been entered, to which complainant objected and excepted:

9. That petitioner, above-named complainant, conceiving itself aggrieved by the refusal of the above Court to grant the prayer of the said Bill of Complaint and by the entry of the decree dismissing the same made and entered on June 25th, 1940, and that an injustice has been done it, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignments of error attached hereto and filed herewith, and pray that the
92 appeal may be allowed, and that a supersedeas be allowed and an injunction be granted enjoining defendant, E. V. Parker, Deputy Commissioner, from issuing, recording, or collecting said award pending this appeal upon the filing of good and sufficient security for costs and to abide and perform whatever decree may be entered in the cause by the Circuit Court of Appeals or to its mandate to the District Court.

And petitioner will ever pray.

MOTOR BOAT SALES, INCORPORATED.
By (Sgd.) S. KING FULTON,
S. King Fulton, *President*.
(Sgd.) M. J. FULTON,
M. J. Fulton, *Proctor*.

[*Duly sworn to by George W. Todd; jurat omitted in printing.*]

93 In United States District Court

[Title omitted.]

Order allowing appeal

Entered and filed July 8, 1940

The foregoing appeal is allowed to the Circuit Court of Appeals for the Fourth Circuit.

(Sgd.) ROBT. N. POLLARD,
United States District Judge.

JULY 8, 1940.

In United States District Court

Assignments of error

Filed July 8, 1940

Motor Boat Sales, Incorporated, petitioner libelant in the above-styled cause, hereby assigns, in connection with its petition for appeal, the following errors:

1. The Court erred in refusing to enjoin the award and dismissing the Bill of Complaint herein and in affirming the award of the Deputy Commissioner, E. V. Parker, and in entering judgment thereon against petitioner-libelant.

2. The Court erred in holding that the claim of respondents-claimants for compensation for the death of George P. Armistead, Jr., "may not validly be provided for by state law."

3. The Court erred in holding that the award herein for compensation to claimants for the death of George P. Armistead, Jr., falls exclusively within the coverage of the Longshoremen's and Harbor Workers' Act, and that the District Court and the Deputy Commissioner had jurisdiction to make such award under said Act.

4. The Court erred in holding that the death of George P. Armistead, Jr., upon whose death the award for compensation was made to respondents, "arose out of and in the course of his employment in maritime, in whole or part, upon the navigable waters of the United States."

94 5. The Court erred in holding that the findings of the Deputy Commissioner were in accordance with law, and were supported by evidence.

6. The Court erred in holding that the findings of the Deputy Commissioner, E. V. Parker, are conclusive and final under the facts and law in this cause and that compensation for the death of George P. Armistead, Jr., may be validly provided under the Longshoremen's and Harbor Workers' Act.

7. The Court erred in holding that the injury and death of George P. Armistead, Jr., was not of a local character, but was maritime, and related to navigation or commerce, and that the relation of master and servant existed between this petitioner-libelant and George P. Armistead, Jr., decedent, at the time of his injury pro haec his injury and death.

8. The Court erred in holding that this petitioner-libelant was guilty of any act resulting in the death of George P. Armistead, Jr., decedent, and was liable for the compensation awarded to claimants.

9. The Court erred in holding that the Longshoremen's and Harbor Workers' Act, as construed in this cause, is not in violation of the Constitution of the United States, in that it holds that the Congress of the United States by such Act may substitute for the constitutional Courts of the United States, in which the judicial power is vested, an administrative agent, namely a single Deputy Commissioner, for the final determination of the existence of facts upon which the enforcement of the constitutional rights of petitioner-libelant depend, and in that it holds that there is no limitation of such Deputy Commissioner's power to determine these fundamental facts, and that such administrative agent has the sole power to determine if recovery through workmen's compensation proceedings may not be validly provided by state law, and thus ousts the Federal Courts of the determination of such facts and law by vesting the sole authority to make them with finality in such Deputy Commissioner or administrative agency, thereby destroying the judicial power as it exists in the Federal Courts under the Constitution of the United States and makes the finding of such an agency in effect finality as to law.

10. The Court erred in holding that the vessel or motor row boat which George P. Armistead, Jr., was in at the time of his death was a vessel within the coverage of the Longshoremen's and Harbor Workers' Act.

11. The Court's judgment is without evidence to support it and is contrary to law and the evidence.

And for other errors that may be hereafter assigned.

Wherefore, petitioner, Motor Boat Sales, Incorporated, prays that judgment entered herein may be reversed and annulled.

(Sgd.) M. J. FULTON,
M. J. Fulton,
Proctor for Petitioner-Libelant.

JULY 8TH, 1940.

95 In United States District Court

Clerk's memorandum

Appeal bond

Cash bond of Sixteen Hundred Dollars ($1,600.00) deposited with Clerk on July 22nd, 1940, and subsequently deposited in the registery of the Court.

Citation

Issued July 9th, 1940

MARSHAL'S RETURN

I certify that on the 12th day of July 1940 I served a copy of the within citation on E. V. Parker, and at the same time handed him a copy of the Order Granting Injunction Pending Appeal, in person, at Norfolk, Va., a place within my District.

(Sgd.) R. L. AILWORTH,
United States Marshal.
By (Sgd.) H. W. FURLOW,
H. W. Furlow,
Deputy U. S. Marshal.

96 In United States District Court

Stipulation as to omission of certain pleadings in record on appeal

Filed July 8, 1940

It is hereby stipulated and agreed by and between the parties hereto, by their proctors:

That the Respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley

Armistead, by leave of Court filed their petition for leave to intervene as parties respondent in this suit; that this Court after the issuance and service of a Show Cause Order, as prayed for in the said petition, in due course allowed the respondents above named in this stipulation to enter their appearance as parties respondent in this matter; that by like leave of Court the said intervening respondents adopted the grounds of the motion to dismiss and of the answer heretofore filed by the respondent, E. V. Parker, Deputy Commissioner, as the grounds of their motion to dismiss and answer; that this Court in due course appointed Aubrey N. Heflin, a discreet and competent attorney at law guardian ad litem for the infant respondents, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead; that by leave of Court, the said Aubrey N. Heflin, guardian ad litem for the above named infant respondents, adopted the grounds of the motion to dismiss and of the answer heretofore filed by the respondent, E. V. Parker, Deputy Commissioner, as the grounds of his motion to dismiss and answer, as guardian ad litem on behalf of the said infant respondents.

It is further stipulated and agreed by and between the parties hereto, by their proctors, that pursuant to Admiralty Rule No. 49, the Clerk of this Court shall omit from the record on Appeal herein the following pleadings:

1. Petition of Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William
97 Berkley Armistead for leave to intervene as parties respondent, filed herein on April 10, 1940;

2. Show cause order on intervening petition, entered herein on April 10, 1940;

3. Order allowing intervention, entered herein on May 16, 1940;

4. Order appointing guardian ad litem for infant defendants, entered herein on May 16, 1940;

5. Order extending time for filing answer by E. V. Parker, Deputy Commissioner, entered herein on February 28, 1940;

6. Order granting injunction pending appeal, entered herein on July 9th, 1940;

And that the Clerk of this Court, in lieu of the pleadings referred to immediately above, shall include in the Record on Appeal a copy of this stipulation.

(Sgd.) M. J. FULTON,
Proctor for libelant,
Motor Boat Sales, Incorporated.
(Sgd.) JNO. V. COGBILL,
Asst. U. S. Atty.
Proctor for respondents.
E. V. PARKER,
Deputy Commissioner.
(Sgd.) R. R. PARRISH,
Proctor for intervening respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead.

JULY 8th, 1940.

98 In United States District Court

Stipulation of proctors as to what shall constitute the record on appeal

Filed July 10, 1940

[Title of Court and style of case omitted.]

To the Clerk of the said Court:

It is hereby stipulated and agreed by and between the parties hereto, by their proctors, that the Record on Appeal herein shall be comprised of the following:

1. Bill of Complaint, filed herein on February 9, 1940.
2. Motion to Dismiss, filed herein by E. V. Parker, Deputy Commissioner, on March 28, 1940.
3. Order filing answer of E. V. Parker, Deputy Commissioner, entered herein on March 29, 1940.
4. Answer of E. V. Parker, Deputy Commissioner, filed herein on March 29, 1940.
5. Transcript of the evidence and the record of the hearing before E. V. Parker, Deputy Commissioner (with exhibits filed therewith), filed herein on March 29, 1940, and marked "Exhibit A"; Findings of Fact and Award of E. V. Parker, Deputy Commissioner, filed herein on March 29, 1940, and marked "Exhibit B."
6. Memorandum by the Court, dated June 11, 1940.
7. Motion of plaintiff for leave to reargue and rehear the above cause, filed herein on June 24, 1940.

8. Order of Court overruling motion to reargue, entered herein on June 24, 1940.

9. Final Decree, entered herein on June 25, 1940.

10. Notice of Appeal, filed herein on July 8, 1940.

11. Petition to allow appeal; order of Court allowing appeal, entered on July 8, 1940.

12. Libelant's assignments of error, dated July 8, 1940.

99 13. Citation, issued by this Court on July 9, 1940.

14. Stipulation of proctors as to the omission of certain pleadings in the record on appeal, dated July 8, 1940.

15. This stipulation, filed herein on July 10, 1940.

16. Certificate of the Clerk.

(Sgd.) M. J. FULTON,
Proctor for Libelant,
Motor Boat Sales, Incorporated.
(Sgd.) JNO. V. COGBILL,
Asst. U. S. Atty.,
Proctor for Respondent,
E. V. PARKER,
Deputy Commissioner.
(Sgd.) R. R. PARRISH,
Proctor for Intervening Respondents, Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead, III, and William Berkley Armistead.

JULY 10, 1940.

100 [Clerk's certificate to foregoing transcript omitted in printing.]

101 In United States Circuit Court of Appeals

For the Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD, ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

Docket entries

August 16, 1940, the transcript of record is filed and the cause docketed.

Same day, original citation is certified up.

August 20, 1940, the appearance of R. R. Parrish and Thos. C. Gordon, Jr., is entered for the appellees Jessie Booker Armistead, Dorothy Marian Armistead, George Percell Armistead III, and William Berkley Armistead.

Same day, the appearance of M. J. Fulton is entered for the appellant.

August 21, 1940, the appearance of John V. Cogbill, Assistant U. S. Attorney, and H. H. Holt, Jr., Special Assistant to the U. S. Attorney, is entered for the appellees.

September 17, 1940, brief and appendix on behalf of appellant are filed.

October 3, 1940, brief and appendix on behalf of appellees are filed.

October 21, 1940, reply brief on behalf of appellant is filed.

October 23, 1940, cause continued, in Open Court, to the November term, 1940.

102 ARGUMENT OF CAUSE

November 23, 1940 (November term, 1940), cause came on to be heard before Parker and Dobie, Circuit Judges, and Chesnut, District Judge, and was argued by counsel and submitted.

103 In United States Circuit Court of Appeals, Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. In Admiralty

(Argued November 23, 1940. Decided January 6, 1941)

Before PARKER and DOBIE, Circuit Judges, and CHESNUT, District Judge

M. J. Fulton, for Appellant, and Robert R. Parrish and Harry H. Holt, Jr., Special Assistant to U. S. Attorney (Sterling Hutcheson, U. S. Attorney; John V. Cogbill, Assistant U. S. Attorney; T. C. Gordon, Jr., and Parrish, Butcher & Parrish, on brief), for Appellees.

Opinion

Filed January 6, 1941

104 DOBIE, Circuit Judge: George Armistead, Jr. (hereinafter called Armistead), an employee of Motor Boat Sales, Incorporated (hereinafter called the Boat Corporation), was drowned when a motorboat in which he was riding was overturned on the James River. Armistead's widow and minor children filed a claim against the Boat Corporation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950), hereinafter called the Act. E. V. Parker, Deputy Commissioner for the Fifth Compensation District of the United States Employees' Compensation Commission (hereinafter called the Deputy Commissioner), made an award in favor of the claimants and against the Boat Corporation. Thereupon the Boat Corporation instituted an action, under the terms of the Act, in the United States District Court for the Eastern District of Virginia, to review, set aside, and enjoin the Deputy Commissioner's award. The District Court, by a final decree, sustained the award of the Deputy Commissioner and dismissed the Boat Corporation's complaint. This appeal was duly taken from that decree.

Armistead was employed by the Boat Corporation as a janitor, porter, or handyman at its store, # 3 West Grace Street, in the City of Richmond, Virginia. His duties appear to have been of the general character usually involved in such a job. He had no specialized knowledge about boats or motors. The Boat Corporation was engaged in selling small boats, outboard motors, and maritime supplies needed in the types of boats it sold. The Boat Corporation did not service boats and did not do repair work on boats, engines, or motors upon navigable waters. The boats it sold were fully equipped and ready for service. Unlike the situation as to automobiles, it was not customary for the Boat Corporation to demonstrate on navigable waters the boats that it had for sale; for in this type of business it seems that a boat,
105 when once placed in the water and run, becomes, for trade purposes, a second-hand boat. On occasions, employees were sent, in the performance of their duties, upon navigable waters, but these occasions were rather few and somewhat far-between. The testimony is clear that Armistead had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats, or perform any services on navigable waters.

On August 8, 1938, the day on which Armistead was drowned, a Mr. Crown and his brother came by the store of the Boat Corporation with a fifteen-foot rowboat. The Crowns talked with Mr. Hobbs and Mr. Lloyd, Assistant Managers of the Boat Corpora-

tion, about the purchase of a second-hand outboard motor for this boat, and two particular motors were examined by the Crowns, with the idea that one of these might be purchased. It was decided that these two motors would be sent down to the James River to be attached to the boat and to be tested and operated. Both Johnnie Cooper (hereinafter called Cooper), a mechanic's helper of the Boat Corporation, and Armistead went with the motors.

The testimony is not altogether clear as to just what instructions were given by the officers of the Boat Corporation as to Armistead's duties. It seems, though, that these instructions contemplated that Armistead was to go along as a strong-arm man to help lift the motors from the car to the boat on the river and, after the motors had been tested, to help in lifting the motors back from the boat to the car. It would, of course, have been the mark of wisdom for the officers of the Boat Corporation to caution Armistead then and there against going out on the James River in the boat. This was not done. These officers testified, however, that though they said nothing on this particular occasion about Armistead going out on the river in the boat, Armistead had been previously given specific warning against going out on boats; and that they, therefore, fully contemplated that he would not
106 go out on the river in the boat, but would stay on shore and limit his activities solely to such efforts as were necessary to carry the motors to and from the boat. The testimony shows that Armistead had never before been sent by the Boat Corporation on any work that might take him upon navigable waters. There was testimony that Armistead had once acted as watchman on a boat; but this was an undertaking completely on his own, outside of his hours of work and not on behalf of the Boat Corporation.

When the party, on the day in question, reached the shore of the James River, one of the outboard motors was, with the assistance of Armistead, attached to the boat and a trip on the James River was begun. Armistead got in the boat with the others and made this trip. No one either specifically told him to go in the boat or impliedly encouraged him to do so. However, it is equally clear that before he got in the boat, no one told him not to get in, and that, after he had taken his place, no one told him to get out of the boat.

After this first trip was completed, when one of the outboard motors had been tested on the boat, the two Crowns stated that they had an engagement and left. Thereupon, with Armistead's aid, the first outboard motor was removed from the boat and the second outboard motor was attached. Armistead again got in the boat and the ill-fated second trip was begun. Cooper occupied the stern of the boat, operating and navigating the boat, while Armistead sat in the bow. On this second trip, again Armistead was not

asked to get in the boat; again no one forbade him to get in, and no one later asked him to get out of the boat. Cooper testified that he gave Armistead no instructions as to any duty that Armistead was to perform on his ill-fated trip; but Cooper testified further that Armistead did act as lookout on this trip. The boat struck some obstruction, was capsized, and Armistead was drowned.

Some questions of administrative procedure under the Act
107 are involved in this appeal. We shall confine ourselves, however, to a discussion of the single question of whether or not Armistead's employment brought him within the ambit of the Act. As to that inquiry, we think that the answer must be in the negative and that, in the light of this answer, the judgment of the District Court must be reversed.

The federal Longshoremen's and Harbor Workers' Act of 1927 was enacted, with the New York State Compensation Act as a model, to set up a compensation scheme for injury or death on navigable waters, provided that no recovery could be had under state laws, by reason of the maritime character of the employment of the person who was killed or injured. The history of the Act is outlined by Chief Justice Hughes in Nogueira v. N. Y. etc. Ry. Co., 281 U. S. at p. 136, 50 S. Ct. at p. 375; while many of its provisions are sketched by the Chief Justice in the leading case of Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285. The Act is admirably discussed, with ample citation of authorities, in Robinson on Admiralty, pages 109–133. As we interpret the Act, it was designed to cover a gap between the real seamen and sailors—"seafaring men with sad, sea-weary eyes"—on the one hand, and the landlubbers, whose labors never took them upon the bounding deep, on the other hand. Between these two classes was a large group of laborers whose tasks have been called amphibious—a part of their work was on the land, another part was on navigable waters. These were the longshoremen and harbor workers. For them a federal compensation act seemed fair; so Congress enacted this statute.

The Act applies "only if the disability or death results from an injury occurring upon the navigable waters of the United States" (Act, Section 2 (a)). There seems to be no question that this requisite was completely fulfilled in the instant case. Clearly, too, the employer-employee relation, another requisite of liability, existed between Armistead and the Boat Corporation at the time of Armistead's death.

108 This same section of the Act also permits recovery under the Act "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." And under Section 2 (4), we find: "The term 'employer' means an employer, any of whose employees are em-

ployed in maritime employment, in whole or in part, upon navigable waters of the United States." Sections 2 and 3 of the Act are the nub of this case. "Maritime employment" under the Act excludes matters that are purely "local." Thus, in 2 Corp. Jur. Sec. at p. 132, we find:

"Under the Federal Compensation Act, providing that compensation shall be payable only if recovery may not validly be provided by state law, an injury received in an employment, although maritime, pertaining to local matters, and having only an incidental relation to navigation and commerce, is subject to the application of the local compensation act and without the scope of the federal act."

It is not necessary here for us to discuss in detail the well-known hair-line that divides the federal admiralty jurisdiction, on the one hand, from the purely local jurisdiction of the states, on the other hand. Landmarks in this field are Southern Pacific v. Jensen, 244 U. S. 205, 37 S. Ct. 524; Cathelentis v. Luchenbach Steamship Co., 247 U. S. 372, 38 S. Ct. 501; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438; Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 S. Ct. 157; Great Lakes Dredge and Dock Co. v. Kierejewski, 261 U. S. 479, 43 S. Ct. 418. We are here concerned with the difficult problem of a specific statutory application of the general rule. Was Armistead engaged in maritime employment at the time of his death so that a recovery may be had under the Act? Or was his employment "not so directly connected with navigation and commerce that to permit the rights of the
109 parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law"? (2 Corp. Jur. Sec. 131).

We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus was without the scope of the Act. Though it is by no means conclusive, we think the title of he Act (Longshoremen's and Harbor Workers' Act) is very informative on our problem. Here is a janitor in a city store, who has been forbidden to go out on boats in navigable waters. To call him a harbor worker or a longshoreman would seem to be a misnomer. When he was sent by his employer on the day of his death to the shore of the James River, this, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters.

Counsel for Armistead laid great stress on the fact that Armistead was a colored man, sent to help a white man; that when Armistead took his place in the boat on the first trip, without any objection from Cooper, and when he again, without objection from Cooper, took his place in the boat for the tragic second trip, this extended the scope of his employment; and that, as a result,

Armistead, during the second trip, was actually engaged in maritime employment, as that term is used in the Act. In other connections, and for other purposes, there may well be real force in this argument. Yet, when it is remembered that Armistead had been expressly forbidden by his employers to go on navigable waters in boats, we do not think that Cooper's passive acquiescence (if such it be) has sufficient legal force to bring the death of Armistead under the beneficent terms and scope of the Act. His activities, we believe, were still local, and the control of these activities by state law works no material prejudice to the general maritime law which, in turn, is enforced as a matter of federal concern by the federal courts. We think "the employment * * * pertains to local matters, having only an inci-
110 dental relation to navigation and commerce." Associate Justice VanDevanter, in Sultan Ry. & Timber Co. v. Department of Labor, etc., 277 U. S. 135, 48 S. Ct. 505.

It should be noted here that compensation is payable under the Act if, for the injury or death, a recovery "may not validly be provided by State law," (Act, Section 3 (a)). It is not necessary for the exclusion of the operation of the federal Act that a recovery should be actually available under a state compensation act. This is clearly brought out by the opinion of Circuit Judge Soper in U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, certiorari denied, 290 U. S. 639, 54 S. Ct. 56. The Boat Corporation in our case was not subject to the Virginia Workmen's Compensation Act, because it did not employ the minimum number of employees to bring it under the Virginia statute; but we think that Armistead's employment was so local in character that had the Boat Corporation employed the required number of employees, an action could have been brought under the state statute, and that is determinative. If the state statute can apply, the federal statute cannot.

The cases under the Act defining its scope and application are literally legion. Many of these cases will be found in the state courts, when an attempt was made to bring the injury or death within the provisions of the compensation act of the state in question. These cases, of course, are not all consistent. We think, however, that the cases have worked out a fairly well-defined theory and philosophy of the Act; and, further, we believe, that under this theory and philosophy of the Act, our decision fits with the holdings in the great majority of these cases. These cases do not prick out a clear and clean-cut line of demarcation between maritime employment and employment that is purely local; yet the cases do furnish valuable guides in a field in which we must proceed largely upon intuitions grounded in experience. We shall now proceed to discuss some of the more important of

these cases. It is manifestly impracticable even to cite all of them.

111 First, we shall consider the cases in which the employment was held to be maritime, not local. One of the best considered opinions in all the books, fortified by an ample citation and discussion of the authorities, is St. John v. Thomson, 108 Vt. 66, 182 A. 196, and note in (1936) 22 Va. Law Rev. 822. St. John was employed to go with his employers to a summer resort on Lake Champlain, where he was to work on land, and was also to do what was required of him with regard to a motorboat that was to be operated on Lake Champlain. The motorboat became disabled on Lake Champlain and a rowboat was procured and moored to the motorboat. In some way, this mooring was unloosened and the rowboat drifted away from the motorboat. St. John dove overboard, in an attempt to retrieve the rowboat, and was drowned. The Vermont court held that St. John's employment was maritime and that he could not recover under the Vermont Workmen's Compensation Act. It was expressly stated in this case that since the accident happened on navigable waters, the mere fact that the major portion of St. John's employment was upon land was unimportant; but this was only following Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88. This leading case, we think, can easily be distinguished from our case. An appreciable part of St. John's employment must necessarily have been on navigable waters in the motorboat. In the instant case, however, Armistead was hired as a janitor and cautioned never to go on navigable waters.

The employment was held to be maritime in Mangieri v. Stephens, 232 N. Y. 596, 134 N. E. 586, where the employee was a laborer for a wholesale coal dealer and he slipped and fell into the water while he was pulling a coal boat to the dock. The same result was reached in Doey v. Clarence P. Howland Co., 224 N. Y. 30, 120 N. E. 53, when a carpenter was hurt while making repairs on a steamship; and in Keator v. Rock Plaster Mfg. Co., 224 N. Y. 540, 120 N. E. 56, certiorari denied, 248 U. S. 574,

112 when an employee was injured while unloading rock from a vessel. There were like holdings in Wheeler Shipyard Co. v. Lowe, 13 F. Supp. 863, where an employee, a painter and utility man in a shipyard company, was drowned while delivering a motorboat to a customer; in Buren v. Southern Pacific Co., 50 F. (2d) 407, when a brakeman was injured while unloosing brake upon a train which was being ferried across navigable waters; and, also, in Wood Towing Co. v. Parker, 76 F. (2d) 770, when the employee, a carpenter and general utility man for a company which operated tugs and barges, was injured while installing an engine on a motorboat purchased by the employer. Even repair-

ing a completed vessel upon navigable waters has been held to be maritime. Robins Dry Dock Co. v. Dahl, 266 U. S. 449, 45 S. Ct. 157; John Baizley Iron Works v. Span, 281 U. S. 222, 50 S. Ct. 306.

In Independence Indemnity Co. v. Mansfield, 2 S. W. (2d) 547 (Tex. Civ. App. 1928), the employee was cleaning oil tanks on a vessel and this was held to be maritime, even though the general employment of the employee was nonmaritime. A similar result was reached in U. S. Fidelity and Guaranty Co. v. Lawson, 15 F. Supp. 116, when the employee, a carpenter employed by an oil company for such work as he might be called on to do, was injured while he was enlarging the cabin of the private yacht of the president of the company that employed him.

Two other interesting border-line cases, in which the employment was held to be maritime, are worthy of note. In Norton v. Gulf Refining Co., 94 F. (2d) 380, the employee was an oil gauger who had entered on a barge to take samples of her oil cargo. In Moore Ry. Co. v. Pillsbury, 100 F. (2d) 245, the employee was a rigger who ate and slept at home but worked on a launch on which he lost his life.

Now for the cases in which the employment was held to be
113 local rather than maritime. Fairly close to the instant case is Johnson v. Swonder, 84 Ind. App. 155, 150 N. E. 615, in which Chief Justice Nichols said:

"Appellant's decedent had been employed for years by appellee as a helper around a mattress and upholstering manufactory, and incidental to that employment he was sent on the day of the accident to assist in upholstering on a small speed boat used for appellee's business during the week and on Sundays for pleasure. It is well established that generally federal courts have exclusive jurisdiction of admiralty matters, but where, as here, the enforcement of the state statute works no material prejudice to the characteristic features of the general maritime law, nor interferes with the proper harmony or uniformity of that law in its international or interstate relations, the general rule does not apply."

Equally illuminating is Madderns v. Fox Film Corp., 200 N. Y. S. 344, in which a moving-picture actor, while enacting a scene on a boat in navigable waters, tripped and fell into the water. This was held to be local, and the Court said:

"His work on the boat was merely incidental to his general duties as an actor, and had nothing to do with the boat, save to use it as a background for a moving picture, which, except for this simple incident, was produced upon the land."

The employment was held to be merely local in Travelers' Insurance Co. v. Bacon, 30 Ga. App. 728, 119 S. E. 458, where an em-

ployee was to fish in the employer's boat in navigable waters, but always in sight of land, his compensation to be determined by the size of his catch, and he was drowned when he jumped into the water, after an explosion on the boat set fire to his clothes; also in United Dredging Co. v. Industrial Commission, 92 Cal. App. 110, 267 P. 763, where a man, employed as a helper and all-around man on a dredge, was drowned while operating a rowboat used to carry men from the dredge to the shore.

114 Another leading case is In re Herbert, 283 Mass. 348, 186 N. E. 554, and see notes on this case in 4 Detroit Law Rev. 36 and 38 Monthly Labor Rev. 99. Herbert worked on a scow used to ferry garbage to an island about two miles away in Boston Harbor. His job was to sweep the scow after it had been unloaded. He was engaged in this work while the scow was tied up at the island when he fell overboard. Said Chief Justice Rugg:

"It seems to us difficult to conceive of anything more local in its general nature. * * * It does not appear that the deceased had anything directly connected with maritime affairs * * *."

The Supreme Court of Washington has held in two interesting cases that the employment was not maritime. In Dewey Fish Co. v. Department of Labor and Industries, 181 Wash. 95, 42 P. (2d) 1099, note 10 Wash. Law Rev. 165, the employee worked on vessels in the job of driving and capping piles and hanging upon these piles webbing which served as a fish trap. He also helped to service and repair these traps. He lived on the vessel through the fishing season, but the vessel came into a sheltered cove at night. He had nothing to do with operating or navigating the vessel. In Eclipse Mill Co. v. Department of Labor and Industries, 141 Wash. 172, 251 P. 130, the employee worked upon navigable waters in booming and rafting logs preparatory to towing.

In three other cases the local doctrine was applied by state appellate courts. In McLain v. Kansas City Bridge Co., 83 S. W. (2d) 132 (Missouri 1935), the employee was working as a laborer on a pile driver mounted on a boat anchored in the Missouri River, and the general job was that of placing piles in the river to turn the current. Quite similar was Belk v. Massman Construction Co., 133 Neb. 303, 275 N. W. 76, note 17 Neb. Law Rev. 39, in which the employee was hired to fire a boiler used to

115 operate a pile driver on a barge. In Jones v. International Mercantile Marine Co., 252 App. Div. 347, 300 N. Y. S. 238, the employee was a watchman on a vessel which, though out of commission, had not been dismantled and was still seaworthy, and was temporarily laid up until the vessel would be needed later.

Other cases lighting the outer edge of, but held to be within, the local doctrine, were: Wooley v. E. M. Wichert Co., 275 Pa. 167, 118 A. 765, involving a fireman on a derrick boat which was anchored in a harbor and used for excavating purposes; McBride v. Standard Oil Co., 188 N. Y. S. 90, chauffeur of truck sent to a vessel at a wharf to receive merchandise from a vessel; Lumberman's Reciprocal Association v. Adcock, 244 S. W. 645 (Tex. Civ. App. 1922), employee of a lumber company who worked on a raising boat on a navigable stream to raise logs; Bockhop v. Phoenix Transit Co., 97 N. J. 514, 117 A. 624, employee was injured while painting a ferry boat moored to a dock, when ferry boat was struck by a lighter; Sunny Point Packing Co. v. Faigh, 63 F. (2d) 921, watchman on a fishing trap floating on navigable waters.

In South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251, 260, 60 S. Ct. 544, 549, the Supreme Court took care to point out that the Act was applicable to employees whose service was that of a sort performed by longshoremen and harbor workers. And in Sulan Ry. & Timber Co. v. Department of Labor, 277 U. S. 135, 48 S. Ct. 505, it was stated that the Act was not applicable even if the employee's work had some admiralty feature, provided this work had only incidental relation to navigation, so that the rights and duties of employer and employee could properly be regulated by local or state law, without working material prejudice to the characteristic features of the general maritime law.

Armistead's case, we think, differs from the cases discussed above by virtue of the fact that in all of these cases
116 the tasks assigned, and the instructions given to the employee, necessarily involved the presence of the employee on navigable waters. Armistead, however, was a janitor and he had been expressly cautioned by his employers never to go on boats in navigable waters. Any authorization for Armistead's going on the ill-fated boat trip in question, which may be binding upon his employer, can be predicated only upon the theory that Cooper, the mechanic's helper, was a supervisory employee as to Armistead, and that Cooper's negative acquiescence to Armistead's presence in the boat on this trip might bring the making of this trip within the scope of Armistead's employment. Even should this theory be applicable here, we still believe that any admiralty feature of Armistead's employment falls well within the local doctrine, as that doctrine has been expounded and applied by the courts in connection with the Longshoremen's and Harbor Workers' Act. Armistead was not a mechanic; he had no expert knowledge of outboard motors. This record is devoid of any evidence which might show that, when Armistead was sent upon the errand on the day of his death, the officers of the Boat Corporation ever contemplated that he would go out upon the river in the boat owned by the brothers Crown.

Let us suppose that the officers of the Boat Corporation desired to take out insurance, which would fully protect the corporation against any claims for injury or death which might be made against it, arising out of any injury to, or any such death of, its employees. Would it have occurred to its officers, acting carefully and prudently, to take any policy so worded as to include within its coverage a possible claim against the corporation on the part of Armistead, under the Longshoremen's and Harbor Workers' Act? We hardly think so, even though the Boat Corporation employed too few employees to come within the Virginia Workmen's Compensation Act.

117 Since our decision in this case places the death of Armistead beyond the pale of the federal Act, and since the Boat Corporation is not subject to the State Compensation Act, the result we have reached may well seem unfortunate and regrettable. It is our function, however, to interpret and construe statutes, not to make them, and not to extend them beyond what appears to be the legislative intent. We cannot obey the Shakespearian maxim and wrest the law to our authority, even once. The Longshoremen's and Harbor Workers' Act is indeed a remedial statute, enacted to subserve an admirable purpose. It should perforce be construed liberally, even generously; but its provisions should not be so distorted by the courts as to make it a trap for employers.

The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment in favor of the plaintiff-appellant, **Motor Boat Sales, Incorporated.**

Reversed.

118 In United States Circuit Court of Appeals, Fourth Circuit

No. 4693

MOTOR BOAT SALES, INCORPORATED, APPELLANT

vs.

E. V. PARKER, DEPUTY COMMISSIONER, AND JESSIE BOOKER ARMISTEAD ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia

Decree

Filed and Entered January 6, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, with directions to enter judgment in favor of the appellant Motor Boat Sales, Incorporated, in accordance with the opinion of the Court filed herein.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

JANUARY 6, 1941.

On another day, to wit, February 6, 1941, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Richmond, in due form.

119 In United States Circuit Court of Appeals, Fourth Circuit

January Term, 1941

Order authorizing clerk to use original transcripts of records in making up records for use in the Supreme Court of the United States on applications for writs of certiorari

For reasons appearing to the Court, it is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

JOHN J. PARKER,
Senior Circuit Judge.

A true copy.
Teste:

[SEAL] CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

120 [Clerk's certificate to foregoing transcript omitted in printing.]

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U. S. GOVERNMENT PRINTING OFFICE 1941

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941